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No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Alabama courts deprive Petitioner of due process of law when they ignored this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip* and affirmed a punitive damages award without considering any of the following:

- The trial court's instruction to the jury that the conduct underlying the punitive verdict was not wrongful;
- Petitioner's deteriorated financial condition;
- Evidence that the impact of the punitive verdict would fall upon the taxpayers of Finland;
- Other punitive damage awards assessed against Petitioner for the same course of conduct;
- The disparate relationship between the awards of $6 million in punitive and $150,000 in compensatory damages;
- Comparison of the punitive damages verdict with other verdicts in similar cases?

2. Should the split among federal circuits and state appellate courts over the interpretation of this Court's decision in *Haslip* be resolved in favor of requiring the reviewing courts:

a. To look beyond the question of passion and prejudice to whether the punitive damages award is reasonably related to its purposes; and

b. To consider the objective factors enumerated in the previous question?

3. Do the Fourteenth Amendment and the Friendship Treaty between the United States and Finland protect a Finnish-owned corporation from imposition of punitive damages in circumstances in which such damages could not be awarded against a domestically-owned corporation?

LIST OF PARTIES

Petitioner Union Mortgage Company, Inc. was the defendant below in the Circuit Court of Lowndes County, Alabama and the appellant in the Supreme Court of Alabama.

Respondents Willie Mae Barlow and Willie J. Galy were the plaintiffs in the Circuit Court and the appellees in the Alabama Supreme Court.

STATEMENT PURSUANT TO RULE 29.1

Union Mortgage Company, Inc. is a Texas corporation wholly owned by USF Holdings, Inc., a Delaware corporation, which is wholly owned by Skopbank, a nationalized Finnish banking corporation with its principal place of business in Helsinki, Finland. The Bank of Finland, a governmental institution which serves as the national central bank of Finland, controls Skopbank through Scopulus Oy, a Finnish holding company wholly owned by the Bank of Finland, which owns 52.91 percent of Skopbank's shares and has 63.59 percent of its voting power.

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PETITION FOR A WRIT OF CERTIORARI

Union Mortgage Company, Inc. ("Union") respectfully petitions for a writ of certiorari to review the Alabama Supreme Court's Opinion, dated January 10, 1992 (the "Opinion"), the court's Order dated January 10, 1992, in which the court, after reconsideration, reversed its prior ruling that had granted Union's motion to supplement the record ("Reconsideration Order"), and the court's Order dated March 6, 1992, denying rehearing with respect to the Opinion and Reconsideration Order ("Rehearing Order").

OPINIONS BELOW

The Opinion of the Supreme Court of Alabama is reported at 595 So. 2d 1335 and is reprinted in Appendix A ("App."). The order of the Alabama Supreme Court granting Union's motion to supplement the record is unpublished and is reprinted in Appendix B. The Reconsideration Order and Rehearing Order of the Supreme Court of Alabama are unpublished and are reprinted in Appendices C & D, respectively. The judgment and order of the Circuit Court of Lowndes County, Alabama are unpublished and are reprinted in Appendices E & F, respectively.

JURISDICTION

The Opinion and Reconsideration Order of the Supreme Court of Alabama were entered on January 10, 1992. (App. 1a, 29a.) On March 6, 1992, the court denied a timely application for rehearing. (App. 31a.) This Court has jurisdiction to review the judgment of the Alabama Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

TREATIES

The text of Articles I, XVI, and XVII of the Treaty and Protocol between the United States of America and Finland of Friendship, Commerce, and Consular Rights of February 13, 1934, 49 Stat. 2659, as modified by the Protocol of Regents of December 4, 1952, 4 U.S.T. 2047 ("the Friendship Treaty"), is reprinted in Appendix F.

STATEMENT OF THE CASE

Introduction. This case involves a $6 million punitive damage award assessed against a mortgage company for alleged fraud in connection with its purchase of an $8,000 home improvement loan at an undisclosed discount. The jury was instructed that the discount on which the punitive award was based was not wrongful. The victim of the alleged fraud profited from the transaction. The mortgage company against which the award was assessed was fully punished for the same conduct in another case. Its net worth is below zero. Its foreign parent has been nationalized and placed in receivership, causing the impact of the award to fall on innocent foreign taxpayers. Departing from their own constitutionally-mandated procedures, the Alabama courts refused to consider any of these factors and affirmed the award.

The Transaction and Verdict. Respondents' complaint stems from Union's purchase of their $8,000 home improvement contract. Skopbank, a Finnish banking corporation, acquired Union after the events complained of here. (App. 46a.)[1] Respondents allege that this contract was tainted by fraud because the home improvement contractor did not disclose to them that it intended to sell their loan to Union at a 10 percent discount. (App. 3a-5a.) That discount, which the trial court instructed the jury was lawful and did not require any disclosure by Union, became the basis for a $6 million punitive damages

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[1] The Affidavit of Mr. Tom Grönberg, Director General for Legal Affairs of the Foreign Ministry of Finland, has been lodged with the clerk of this Court and is reprinted in Appendix H.

award against a mortgage company repeatedly described by Respondents to the Alabama jury as a Texas corporation owned by a Finnish bank, which had sold the contract at issue to the "Japs." (App. 49a-51a, 55a-57a.)[2] Respondents, who Union at one time threatened with foreclosure, claimed psychological injuries and shoddy workmanship in their home repairs. But because they made only five or six loan payments, they suffered no financial loss, and in fact had *gained* approximately $3,000 before the jury's award of $152,000 in compensatory and $6,001,000 in punitive damages. (App. 51a-54a.)

The Order of the Trial Court. After the verdict, Respondents moved to confirm the verdict, invoking Alabama's post-verdict punitive damage review procedures. In its April 22, 1991 brief in opposition to Respondent's motion, Union raised a constitutional due process challenge based on the excessive nature of the award and Union's exposure to multiple punitive awards for the same course of conduct. (App. 60a-63a.)[3] Disregarding Union's constitutional challenge, the Circuit Court for Lowndes County, Alabama upheld both the compensatory and punitive damages awards in full. (App. 38a, 40a.)

The trial court justified the punitive award on an alleged "pattern and practice of intentional fraud affecting citizens throughout the state of Alabama and indeed the continental United States." (App. 38a.) The court found such a pattern of fraud to exist because Union had failed to disclose that it had purchased home improvement loans, including Respondents', from contractors at a discount. (*Id.*) According to the court, "the manner in which the defendant conducts its business will always result in harm to the customer due to the fact that there is no disclosure of the 'chop.'" (App. 40a.)

The "discount theory" upon which the trial court affirmed the punitive damages verdict is irreconcilably at

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[2] Excerpts from the record below are reprinted in Appendix I.

[3] Excerpts of the Memorandum Brief of Defendant, submitted April 22, 1991, are reprinted in Appendix J.

odds with the same court's instructions to the jury that the discount was "not illegal, wrongful or improper" and involved no disclosure duty:

> "Now, ladies and gentlemen, I charge you that it is not illegal, wrongful or improper for Union Mortgage to charge a discount when buying its paper. Likewise there is no legal or contractual duty that requires that Union Mortgage disclose to the Plaintiff that it purchased the Plaintiff's mortgage at a discount."

(App. 58a.)

The trial court further found that the punitive award was "not excessive considering the economic impact on the defendant." (App. 38a.) In reaching this conclusion, the court assessed Union's financial condition by reference to the financial condition of Skopbank, despite the fact no finding was made that Union was an alter ego of Skopbank. (App. 38a-39a.)

Developments Subsequent to the Trial Court's Order. In August 1991, after another Alabama jury rendered a verdict of $5 million in compensatory and $40 million in punitive damages against Union in *Baker v. Harper*, No. CV-90-048 (Ala. Cir. Ct. Barbour County July 24, 1991) (App. 65a)[4]—a case nearly identical to this one—Union ceased accepting new business and entered a "shut-down" mode. (App. 68a.)[5] By that time, Union had a negative net worth of $4 million and projected a 1991 loss of approximately $20 million. (App. 67a, 78a.)

In September 1991, Skopbank was nationalized and placed into receivership under the laws of Finland. (App.

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[4] The order of the Circuit Court of Barbour County, Alabama entering the jury's verdict is unpublished and is reprinted in Appendix K.

[5] Excerpts from the *Baker* post-trial transcript are reprinted in Appendix L. These are among the materials that were added to the record below on Union's motion to supplement the record (reprinted in Appendix M), and thereafter deleted from the record by the Reconsideration Order. (App. 29a.)

46a.) Pursuant to this receivership, the Bank of Finland, a governmental institution that serves as Finland's central bank, took over majority beneficial ownership and control of Skopbank. Skopbank is not only Union's parent, but also its largest creditor. (*Id.*) Accordingly, the effect of Skopbank's nationalization is that the punitive damages awarded against Union will be borne by the taxpayers of Finland, and not by any wrongdoer. (*Id.*)

The Decision of the Alabama Supreme Court. In its brief on appeal to the Supreme Court of Alabama, Union again argued that the punitive damages award violated its constitutional due process rights. (App. 82a-85a.)[6] On November 14, 1991, Union moved to supplement the record on the basis of subsequent developments which "rendered any punitive damages award against Union constitutionally impermissible by reference to the Alabama and United States constitutions." (App. 79a-80a.)[7] These developments included: (i) Union's deteriorated financial condition and cessation of business operations; (ii) Skopbank's nationalization and receivership by the Bank of Finland owing to its own deteriorated financial condition; and (iii) an order in *Baker v. Harper*, No. CV-90-048 (Cir. Ct. Barbour County Nov. 13, 1991) ("*Baker* order"), affirming the judgment against Union on the condition that the *Baker* plaintiffs accept a remitted award of $4,500,000 in punitive and compensatory damages, which was satisfied on November 13, 1991. (App. 86a-103a.)[8] On December 3, 1991, the Alabama Supreme Court granted Union's motion. (App. 28a.)

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[6] The Table of Contents of the Brief of Appellant, filed July 12, 1991, is reprinted in Appendix N.

[7] Ala. R. App. P. 10(f) (superceded Oct. 1, 1991); Ala. R. Civ. P. 60(b); *see also Industrial Chem. Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 839 (Ala. 1988) (on appeal, defendant "once again may present proof as to the excessiveness of the award"); *Killough v. Jahandarfard*, 578 So. 2d 1041, 1047 (Ala. 1991) (holding appellate record may be supplemented to include evidence of changed circumstances reflecting the financial impact of the punitive award).

[8] The *Baker* order, which is unpublished, and Union's satisfaction of judgment are reprinted in Appendices O and P.

Nevertheless, on January 10, 1992, the Alabama Supreme Court issued an opinion affirming the order of the trial court, and a separate order reconsidering and reversing its previous order permitting Union to supplement the record. (App. 30a.) Like the trial court, the Supreme Court relied on the theory that Union's failure to disclose the discount constituted fraud either by the contractor as agent, or as a result of a conspiracy with the contractor. (App. 3a-5a.) After quoting the trial court's order *verbatim* and stating that it would "not address any constitutional issues," the Alabama Supreme Court then affirmed all but $2,000 of the damages award. (App. 19a-25a.) Union filed a timely application for rehearing, raising all of the points that are argued herein. (App. 104a-06a.)[9] On March 6, 1992, the Alabama Supreme Court, without comment or explanation, issued an order denying the application for rehearing. (App. 32a.)

REASONS FOR GRANTING THE WRIT

The petition for a writ of *certiorari* should be granted in this case to resolve a sharp division among the state and federal appellate courts concerning the nature of review of punitive damage awards required under *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). The need for such review is heightened by an explosion in the size and amount of punitive awards, which have continued to "run wild" since *Haslip*.

Alabama's post-verdict review process—the heart of this Court's affirmance in *Haslip*—was shown in this case to be so cursory as to amount to nothing more than rubber stamp approval of the jury verdict. The Alabama courts flouted their own constitutionally mandated procedures by:

- disregarding the requirement that a defendant's conduct be "reprehensible" and instead affirming the punitive verdict on the basis of conduct (purchasing

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[9] The Table of Contents of Union's Brief in Support of Application for Rehearing and Stay of Execution of Judgment, filed January 31, 1992, is reprinted in Appendix Q.

home improvement contracts at a discount) that the jury had been instructed was lawful and proper;

- failing to consider Petitioner's dramatically deteriorated financial condition;
- refusing to consider evidence that the impact of the punitive verdict would fall upon innocent third parties—the taxpayers of Finland;
- ignoring a punitive damage award assessed against Petitioner in another case which was intended as full punishment for the same course of conduct;
- refusing to evaluate the rationality of the relationship between punitive and actual damages where there was no out-of-pocket loss and punitive damages exceeded compensatory damages by forty times;
- failing to compare the punitive award with awards in similar cases; and
- according the jury's verdict a presumption of correctness, despite the fact that the jury was barred from considering the critical mitigating factors enumerated in *Haslip*.

Apart from the importance of resolving the division in the circuits and the state appellate courts regarding the meaning of *Haslip*, *certiorari* should also be granted:

- to prevent foreign-owned corporations from being denied immunities from punitive damages enjoyed by domestically-owned corporations in violation of the Fourteenth Amendment and a U.S. treaty obligation;
- to resolve confusion in the lower courts concerning the constitutionality of multiple punitive damage awards punishing the same course of conduct; and
- to remedy the violation of Petitioner's due process rights caused by the failure of the courts below even to consider constitutional issues raised at the first available opportunity.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT OF AUTHORITY AMONG THE STATE AND FEDERAL APPELLATE COURTS

A. *Haslip* Requires More Than A "Passion And Prejudice" Review

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court held that the procedures it was told were followed by Alabama courts in evaluating punitive damages awards provided due process of law. These procedures seemed to assure that punitive awards in Alabama would be reasonable and rational in light of their purpose to punish and deter. *Id.* at 1045.

The procedures upheld in *Haslip* included a post-trial hearing pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), which required the trial court " 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' " *Haslip*, 111 S. Ct. at 1044 (quoting *Hammond*, 493 So. 2d at 1379). The *Haslip* court also noted that, in determining whether a punitive award was excessive or inadequate, the Alabama courts undertook consideration of a series of specific objective factors mentioned in *Hammond* and elaborated upon in *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989). *Haslip*, 111 S. Ct. at 1044-45.[10] Consideration of these factors was to ensure "meaningful and adequate review by the trial court." *Id.* at 1044.

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[10] These factors included: (i) the relationship between the punitive damages award and the harm resulting from the defendant's conduct; (ii) the degree of reprehensibility of the defendant's conduct; (iii) the profitability to the defendant of the wrongful conduct; (iv) the financial position of the defendant; (v) the costs of litigation; (vi) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; (vii) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation, (viii) the desirability of discouraging others from similar conduct, (ix) the impact upon the parties, and (x) the impact on innocent third parties.

Haslip cited with approval the Alabama Supreme Court's subsequent review, which was supposed to:

> "provide[] an additional check on the jury's or trial court's discretion. [1] It first undertakes a comparative analysis. [2] It then applies the detailed substantive standards it has developed for evaluating punitive awards. [3] In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."

Id. at 1045. These two layers of review, in which the Alabama trial and appellate courts were to bring to bear all of the factors set forth in *Hammond* and *Green Oil*, were cited as "ensur[ing] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.*

B. A Split Of Authority Has Developed Concerning The Nature Of Post-Trial Review Required By *Haslip*

Although *Haslip* held that the Alabama procedures for awarding punitive damages are constitutionally sufficient, it did not explicitly state that each of the principal features of those procedures is constitutionally required. Accordingly, in his concurring opinion in *Haslip*, Justice Kennedy noted that:

> "It is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter, and this tension in its analysis now must be resolved in some later case."

111 S. Ct. at 1055. Similarly, Justice Scalia commented in his concurrence that:

> "This jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently 'reasonable,' and thus perpetuates the uncertainty that our grant of *certiorari* in this case was intended to resolve."

Id. at 1046-47.[11]

The confusion predicted has become a reality. In the brief period following the decision in *Haslip*, a significant split among the state appellate and federal circuit courts has emerged regarding the nature of the review that trial and appellate courts must give a punitive damages verdict.

The Fourth and Eleventh Circuits and a district court in Missouri have held that a review of punitive verdicts which merely attempts to determine whether the jury's verdict was improperly influenced by "passion and prejudice" fails to comport with the due process required by *Haslip*.[12] Sharing this interpretation are state appellate courts in Alabama, California, Maryland and West Virginia.[13]

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[11] Many commentators agree with these assessments. *E.g.*, R. Riggs, "Constitutionalizing Punitive Damages: The Limits of Due Process," 52 Ohio State L.J. 859, 860 (1991) ("[T]he majority opinion failed to address the major doctrinal questions in a way that would provide helpful guidelines for the future. As a result, the issue is certain to be revisited."); "The Supreme Court, 1990 Term—Leading Cases," 105 Harv. L. Rev. 177, 217 (1991) (*Haslip's* "meager analysis gives courts little guidance for determining what other variations on the common law method of awarding punitive damages will also pass constitutional muster.").

[12] *See, e.g., American Employers Ins. Co. v. Southern Seeding Serv., Inc.*, 931 F.2d 1453, 1464 (11th Cir. 1991) (holding that failure of Alabama district court to apply *Hammond* criteria violated due process); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 100 (4th Cir. 1991) (reviewing South Carolina law); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1349-52 (4th Cir. 1991) (reviewing Virginia law); *Jacobs Mfg. Co. v. Sam Brown Co.*, 1992 U.S. Dist. LEXIS, 264, *38, 46-47 (W.D. Mo. Jan. 7, 1992).

[13] *Valley Bldg. & Supply, Inc. v. Lombus*, 590 So. 2d 142, 147 (Ala. 1991); *MGW, Inc. v. Fredricks Dev. Corp.*, 6 Cal. Rptr. 2d 888, 894 (4th App. Dist. 1992) ("The California standard is the objective type mandated by *Haslip*."); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 709-10 (Md.

On the opposite side of the split are the Fifth Circuit, district courts in Arkansas and Louisiana, and state appellate courts in Georgia, Missouri and Texas. Ignoring the general concern expressed in *Haslip* about punitive damages that "run wild," *id.* at 1043, and the specific concern expressed by Justices of this Court over state schemes that employ only abbreviated review procedures,[14] those courts have held that mere "passion and prejudice" review continues to be constitutionally sufficient.[15]

Thus, litigants face grossly disparate treatment of punitive damages simply by the happenstance of geography:

Objective Review of Punitive Damages Verdicts	Mere Passion and Prejudice Review of Punitive Damages Verdicts
Fourth Circuit	Fifth Circuit
Eleventh Circuit	E.D. Louisiana
W.D. Missouri	W.D. Arkansas
Alabama (?)	Georgia
California	Missouri
Maryland	Texas
West Virginia	

App.), *cert. denied*, 590 A.2d 158 (Md. 1991); *Hodges v. S.C. Toof & Co.*, 1992 Tenn. LEXIS 312, *9-16 (Apr. 20, 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908-10 (W. Va. 1991).

[14] *Haslip*, 111 S. Ct. at 1045 n.10 (citing *Banker's Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

[15] *See, e.g., Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385-86 (5th Cir. 1991) (reviewing Mississippi law); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1093-95 (5th Cir. 1991) (reviewing Texas law), *cert. denied*, 60 U.S.L.W. 3735 (Apr. 27, 1992); *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1100-01 (E.D. La. 1991); *Robertson Oil Co. v. Phillips Petroleum Co.*, 779 F. Supp. 994, 997 (W.D. Ark. 1991); *Hospital Auth. v. Jones*, 409 S.E.2d 501, 503 (Ga. 1991), *cert. denied*, 60 U.S.L.W. 3578 (Feb. 24, 1992); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. App. 1991); *General Motors Corp. v. Saenz*, 1991 Tex. App. LEXIS 2891, at *27 (Nov. 27, 1991).

Not only are the courts divided over the standard of post-trial review required under *Haslip*, but they have also split in their determination of which of the elements of that review are constitutionally required. A number of courts (W.D. Missouri, Alabama Supreme Court (in theory), and the West Virginia Supreme Court) have held that due process requires consideration of *each* of the factors enumerated in *Haslip*.[16] Other courts have held that *Haslip* does not require consideration of such factors as the defendant's financial condition,[17] the impact upon innocent third parties,[18] the existence of other punitive awards punishing the defendant for the same conduct,[19] the amount of punitive damages awarded in comparatively similar cases,[20] and the relationship between punitive damages and the actual harm suffered.[21]

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[16] *E.g.*, *Jacobs Mfg. Co.*, 1992 U.S. Dist. LEXIS 264, at *46-47; *Valley Bldg. & Supply, Inc.*, 590 So. 2d at 147; *Garnes*, 413 S.E.2d at 908-09.

[17] *See, e.g.*, *Laughinghouse v. Risser*, 1992 U.S. Dist. LEXIS 3274, *22 (D. Kan. Feb. 14, 1992); *Hospital Auth.*, 409 S.E.2d at 503. *But see Mattison*, 947 F.2d at 105-06; *Adams v. Murakami*, 813 P.2d 1348, 1355 (Cal. 1991); *Garnes*, 413 S.E.2d at 910 ("The extra factors that the judge must consider * * * are important in determining the constitutionality of any particular damages award. For example, Jeff's Hot Dog Stand, which serves the local neighborhood, will be affected more strongly by a $20,000 punitive damages award than will McDonald's, which serves 'billions and billions.' ").

[18] *Wollersheim v. Church of Scientology*, 6 Cal. Rptr. 2d 532, 543 (2d App. Dist. 1992). *But see George v. International Soc'y for Krishna Consciousness*, 4 Cal. Rptr. 2d 473, 518 n.54 (4th App. Dist. 1992) ("An otherwise appropriate award of punitive damages could be excessive where * * * it substantially impairs the fundamental rights of innocent third parties.").

[19] *E.g.*, *Glasscock*, 946 F.2d at 1098; *Wollersheim*, 6 Cal. Rptr. 2d at 543; *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 659 n.29 (Md. 1992).

[20] *E.g.*, *Glasscock*, 946 F.2d at 1098.

[21] *E.g.*, *Southern Life and Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991) (rejecting the argument that "there is an acceptable mathematical ratio between compensatory damages and the proper amount of punitive damages" in a case in which the

The need to resolve the confusing and disparate treatment among state and federal appellate courts of a constitutional decision of this Court issued just one year ago is itself sufficient reason to grant *certiorari*. Where, as here, the division arises over an issue having profound consequences for public policy and international relations, the need for guidance by this Court is even more compelling.

The "long-enduring debate" about "the propriety" of punitive damages that persuaded this Court to review the Alabama procedures in *Haslip* continues unabated. 111 S. Ct. at 1038. Similarly, *Haslip* has not stemmed what Justice O'Connor described as "an explosion in the frequency and size of punitive damage awards." *Id.* at 1066 (O'Connor, J., dissenting).[22] Punitive damage schemes that, on paper at least, accord even fewer procedural protections than those this Court understood Alabama law to

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punitive damages were 499 times the compensatory damages); *MGW, Inc.*, 6 Cal. Rptr. 2d at 897; *Hospital Auth.*, 409 S.E.2d at 503; *Glasscock*, 946 F.2d at 1098. *But see Alexander*, 596 A.2d at 711 (holding that if the award in *Haslip* came "close to the line," a punitive award "representing nearly fifty times the essentially liquidated compensatory damage * * * surely crosses that line"); *Jacobs Mfg. Co.*, 1992 U.S. Dist. LEXIS 264, at *39 ("due process requires that during post-judgment review of punitive damage awards, consideration must be given to whether the amount of punitive damages awarded was reasonably related to the harm that was caused by the conduct being punished").

[22] *See also Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing."); *OKI America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (punitive awards "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint") (Kozinski, J., concurring); 2 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.01 (1985) (noting "a literal explosion of punitive damage law and practice"); J. Sales and K. Cole, Jr., "Punitive Damages: A Relic That Has Outlived Its Origins," 37 Vand. L. Rev. 1117, 1154 (1984) ("the amount of punitive damages awarded in recent years * * * has escalated to astronomical figures that boggle the mind.").

require in *Haslip* continue to "invite[]—even require[]—arbitrary results." *Id.* at 1067.[23]

The impact of exorbitant and unfair punitive damage awards reaches far beyond those against whom they are assessed. As Justice O'Connor observed in her partial concurrence in *Browning-Ferris*, "[t]he threat of such enormous awards has a detrimental effect on the research and development of new products" and, though such awards " 'may not yet be a major threat to the continued viability of most manufacturing concerns, * * * the[ir] increasing number and size * * * may fairly raise concern for the future stability of American industry.' "[24] Noting the "terrible toll" that unrestrained litigation, including the "dramatic" rise in "random," "capricious," and "disproportionately high" punitive awards, exacts on the U.S. economy each year, the President's Council on Competitiveness has recommended a package of reforms "designed to limit and restrict punitive damages." President's Council on Competitiveness, *Agenda For Civil Justice Reform In America* 1, 6, 8, 22 (Aug. 1991).

The urgent need for legislative reform in this area does not, as this Court recognized in *Haslip*, absolve the judiciary of its responsibility to protect against unfettered discretion that "may invite" such "extreme results" as to "jar one's constitutional sensibilities." 111 S. Ct. at 1043. It is the prevention of just such "extreme results"—in this case and in others—that warrants the grant of *certiorari* here.

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[23] *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("limited only by the gentle rule that they not be excessive * * *, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

[24] 492 U.S. at 282 (quoting D. Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1, 6 (1982)).

C. The Present Case Is An Appropriate Vehicle For Resolving The Split Of Authority That Has Developed Since *Haslip*

At an absolute minimum, *Haslip* establishes that post-verdict review procedures which are incapable of ensuring that "punitive damages awards are not grossly out of proportion to the severity of the offense" run afoul of the Due Process Clause of the U.S. Constitution. 111 S. Ct. at 1045.[25] In the absence of objective criteria against which to evaluate punitive awards, it is impossible for a reviewing court to make a meaningful determination concerning whether such awards "are reasonable in their amount and rational in light of their purpose[.]" *Id.* Accordingly, due process required that many —if not all—of the objective factors identified in *Haslip* should have been considered by the Alabama courts. *See* note 16 *supra*.[26] Regrettably, they were not. Thus, this case affords the Court an opportunity to resolve the uncertainty concerning whether due process requires a reviewing court (1) to look beyond mere passion and prejudice, and (2) to consider the objective factors enumerated in *Haslip*.

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[25] *See also St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (Due Process Clause prohibits civil penalties that are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (civil fines might be "so grossly excessive as to amount to a deprivation of property without due process of law").

[26] Union was not even accorded the mere "passion and prejudice" review which this Court acknowledged to be an absolute minimum requirement in *Browning-Ferris*, 492 U.S. at 256. Indeed, both the trial court and the Alabama Supreme Court refused even to address Union's argument that repeated, gratuitous, and derogatory remarks about the "Finnish," "Finland" and "the Japs" (a reference to a Japanese bank which had purchased some of Union's loans) by Respondent's counsel exploited ethnic and national prejudices and thereby improperly influenced the jury's verdict.

1. *The Alabama Courts Affirmed The Award Of Punitive Damages On The Basis Of Conduct That Was Not Wrongful*

Given the purpose of punitive damages to punish and deter blameworthy conduct, the degree of wrongfulness is the most important single factor in assessing the reasonableness of any punitive award. The only "reprehensible" conduct identified by the courts below was Union's failure to disclose to Respondents that it had purchased their mortgage at a discount or "chop."[27] Yet the trial court had instructed the jury that Union was not only under no obligation to make such a disclosure, but also that such a discount was lawful and proper.[28] That the Alabama courts affirmed the punitive award against Union on the basis of conduct described as lawful and proper dramatically illustrates the absence of any meaningful review of the punitive verdict—and the total disregard of this Court's holding in *Haslip*.

The absence of misconduct should have precluded punitive damages altogether. In *Davis v. United States*, 417 U.S. 333 (1974), this Court held that "conviction and punishment * * * for an act that the law does not make criminal * * * 'inherently result[] in a complete miscarriage of justice' * * *." *Id.* at 346. In commenting upon *Davis*, the Seventh Circuit added the obvious: "[t]o punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law[.]" *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986). Similarly, to award punitive damages in any amount to punish a party in a civil case based

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[27] "[T]he manner in which the defendant conducts its business will always result in harm to the customer due to the fact that there is no disclosure of the chop." (App. 40a.)

[28] "Now, ladies and gentlemen, I charge you that it is not illegal, wrongful or improper for Union Mortgage to charge a discount when buying its paper. Likewise there is no legal or contractual duty that requires that Union Mortgage disclose to the Plaintiff that it purchased the Plaintiff's mortgage at a discount." (App. 58a.)

on conduct that is neither illegal nor improper violates the most basic notions of fundamental fairness.

2. *The Alabama Courts Failed To Consider Evidence Of Union's Deteriorated Financial Condition*

Since the post-trial hearing in this case in April 1991, the financial condition of Union and Skopbank has drastically deteriorated, culminating in Skopbank's receivership and nationalization by the Republic of Finland in September 1991. (App. 46a, 72a-73a, 91a.) In the first eight months of 1991, Skopbank posted a loss of approximately $100 million (App. 74a-75a), and ultimately lost over $1 billion in 1991. (App. 46a.) By September 1991, Union had ceased buying home improvement contracts entirely (App. 69a-70a), had closed all twenty-nine of its branch offices, had laid off over half its employees and was expecting to lay off more in the future, was in a "shutdown mode" (App. 68a-69a), and was no longer accepting any new business. (App. 69a-70a.) Union had a negative net worth of $4 million and projected a 1991 operating loss of approximately $20 million. (App. 67a, 78a.)

In light of its negative and deteriorating net worth, Union's assets cannot hope to satisfy the punitive damages award. (App. 68a.) Even if the $6 million punitive verdict once bore some relationship to its intended purpose, it is now vastly disproportionate to the amount necessary to punish and deter. Moreover, with Union having ceased accepting home improvement loans, the likelihood of recurrence of its "wrongful" conduct of buying such loans at a discount is nil. The Alabama Supreme Court's refusal to consider any of this evidence violated Union's constitutional rights. *Haslip*, 111 S. Ct. at 1044-45; *see* cases cited, *supra*, note 17.

3. *The Alabama Supreme Court Failed To Consider The Impact Of The Punitive Damages Verdict On Innocent Third Parties*

In view of Union's hopeless financial condition, the impact of punitive damages imposed nominally on Union

will fall instead on Skopbank, its parent and largest creditor. However, because Skopbank has been nationalized and placed in receivership, innocent Finnish taxpayers will be forced to bear the burden of the punitive award. (App. 46a, 75a-76a.) Such a result is unjust and furthers none of the purposes which punitive damages are designed to serve. *See* Section II, *infra*. The failure of the Alabama courts even to consider the impact of the punitive award is a denial of due process.

4. *The Alabama Supreme Court Refused To Consider Evidence Of Other Civil Awards Against Union For The Same Conduct*

In *Baker v. Harper*, another Alabama court approved a punitive award against Union for conduct nearly identical to that alleged by Respondents, stating that:

> "A punitive damages award of $500,000 is the maximum amount that can be awarded to accomplish fully society's goals of the deterrence and punishment of Union's entire pattern and practice of conduct throughout the United States."

(App. 92a.) The *Baker* court specifically held that:

> "The punitive damages assessed in this case are intended to punish Union for the entire pattern and practice of conduct throughout Alabama as well as the rest of the United States."

(App. 89a.)[29]

The Alabama Supreme Court ignored the *Baker* Order, reversed its own order that had permitted supplementation of the record in this case to include it, and refused to take judicial notice of it. As will be demonstrated in Section III, *infra*, the Due Process Clause prohibits multiple punishment of a defendant for a single course of conduct. *A fortiori*, the Alabama Supreme Court's failure even to consider other punitive awards against Union for the same conduct violated Union's due process rights. *See Haslip*, 111 S. Ct. at 1045.

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[29] The court in *Baker* allocated the single $500,000 punitive damages verdict equally among five groups of plaintiffs. (App. 92a.)

5. *The Alabama Courts Failed To Evaluate The Rationality Of The Relationship Between Punitive Damages And Actual Damages*

Apart from a conclusory statement in the trial court's order that "the punitive award is consistent with the amount of the compensatory damages," which was incorporated into the Alabama Supreme Court's Opinion (App. 23a, 40a), the courts below ignored their obligation under *Haslip* to ensure that the punitive award "have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. In fact, there was none. The $6 million award of punitive damages here was forty times greater than the amount of compensatory damages, which itself bore no relationship to any fiscal harm caused to Respondents. Indeed, far from having suffered a financial loss, Respondents received a net benefit in cash and home improvements. (App. 51a-54a.) Given the *Haslip* Court's view that a punitive award only four times the amount of compensatory damages and 200 times the plaintiff's out-of-pocket loss was "close to the line" of constitutional impropriety, the award here must surely cross it. 111 S. Ct. at 1046.

6. *The Alabama Supreme Court Failed To Conduct A Comparative Analysis Of The Punitive Damages Verdict*

The Alabama Supreme Court failed to carry out the comparative analysis of punitive damages awarded in other cases mandated by *Haslip*. 111 S. Ct. at 1045. In *General Motors Corp. v. Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992), the Alabama Supreme Court conducted such a comparative analysis and reduced a punitive damage award against General Motors by 50 percent in a case where GM's allegedly egregious pattern of conduct resulted in the death of a seven-year-old boy.

Had Union been accorded the same treatment as GM, a comparative analysis would have revealed that the only two analogous cases resulted in punitive damages less than one-tenth of those upheld here. In *Baker*,

an Alabama court held that $500,000 in punitive damages split among five sets of plaintiffs was the maximum sustainable award against Union for home improvement loans made in nearly identical circumstances. (App. 88a-92a.) And in *Associates Financial Services Co. v. Barbour*, 592 So. 2d 191 (Ala. 1991), a $350,000 punitive award was upheld in a direct fraud mortgage case.

Yet Respondents, whom two justices of the Alabama Supreme Court described as having been "rewarded for their misdeeds" (App. 25a), are to receive $6 million—sixty times the amount awarded to each of the *Baker* plaintiffs. Clearly, if the Alabama Supreme Court had conducted the comparison mandated by *Haslip*, it would have found the award in this case to be completely out of line. Its failure even to address the issue violated Union's due process and equal protection rights.

7. *The Alabama Courts Presumed The Jury Verdict Correct Even Though The Jury Was Barred From Considering Mitigating Factors Required By* Haslip

When *Haslip* was argued to this Court, Alabama law provided that "no presumption of correctness shall apply" either with respect to the trial court's review of the amount of punitive damages awarded by the trier of fact or with respect to the appellate court's subsequent review. Ala. Code §§ 6-11-23(a) and 6-11-24(a) (1987). While these Alabama Code provisions were not at issue in *Haslip*, this Court was specifically informed by Haslip's counsel during oral argument that the "standard of review which the Alabama Supreme Court has been adopting since 1986, expressly provides that the jury verdicts will be *independently reassessed by trial and appellate courts.*" *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 426 n.9 (Ala. 1991) (Maddox, J., dissenting) (quoting from Haslip's counsel's oral argument before the U.S. Supreme Court).

Four days after this Court's decision in *Haslip*, and after the verdict in this case, the Supreme Court of

Alabama struck down those Alabama code provisions in *Armstrong v. Roger's Outdoor Sports, Inc.*, and held that the Alabama State Constitution requires the state courts to accord a presumption of correctness to a jury's verdict. 581 So. 2d at 420-21.

The behavior of the courts below demonstrates that the application of this presumption of correctness in practice deprives Alabama's post-trial procedures for reviewing jury verdicts of most of the protection found meaningful in *Haslip*. In the words of one of the Alabama Supreme Court's own justices, the

> "procedure the Supreme Court of the United States has just found 'ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages' is neither meaningful nor adequate to protect a defendant's 'due process' rights."

Armstrong, 581 So. 2d at 423 (Maddox, J., dissenting); *see also Killough v. Jahandarfard*, 578 So. 2d 1041, 1049 (Ala. 1991) (Maddox, J., dissenting).

It would be irrational and fundamentally unfair to presume that a jury made a correct determination based on the assessment of evidence not allowed before it. Applying such a presumption to the extent of refusing to consider the evidence submitted by Union to both Alabama courts eviscerates the objective process for evaluating punitive awards approved by this Court in *Haslip*.

II. THE DECISION BELOW DEPRIVES FOREIGN-OWNED CORPORATIONS OF IMMUNITIES FROM PUNITIVE DAMAGES ENJOYED BY DOMESTICALLY-OWNED CORPORATIONS IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND TREATY RIGHTS

Both the Alabama Supreme Court and the trial court emphasized the financial resources of Union's foreign parent in affirming punitive damages, even though Skopbank's resources at the time of trial should have been

irrelevant.[30] Once having taken Skopbank's resources into account, however, the state courts were obligated to accept evidence of its subsequent financial deterioration and receivership.

Decisions of this Court, as well as of the Alabama Supreme Court, establish that punitive damages may not be imposed where the burden of such damages falls on innocent third parties. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-71 (1981) (holding municipalities immune from punitive damages in section 1983 actions); *Resolution Trust Corp. v. Mooney*, 592 So. 2d 186, 190 (Ala. 1991) (holding the RTC, as a bank receiver, immune from punitive damages).

In *City of Newport*, this Court stated:

> "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. * * * Regarding retribution, it remains true that *an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort.* These damages are assessed over and above the amount necessary to compensate the injured party."

453 U.S. at 266-67 (emphasis added). Regarding deterrence, the Court reasoned that whatever residual deterrence effect, if any, might be served by burdening taxpayers with punitive damages was outweighed by the "strain on local treasuries." *Id.* at 271. The Eleventh Circuit echoed these concerns in *Matter of GAC Corp.*, 681 F.2d 1295, 1301 & n.5 (11th Cir. 1982):

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[30] The Alabama courts should not have considered the financial resources of Skopbank in imposing punitive damages because: (1) it had no interest in Union at the time the events underlying this cause of action took place; (2) it is not, and never has been, a party to these proceedings; and (3) no finding was made that Union is a mere alter ego of Skopbank. *See, e.g., Gearhart v. Uniden Corp. of Am.*, 781 F.2d 147, 153 (8th Cir. 1986).

> "Where the punitive damages claim is asserted against a * * * receiver * * * the purposes for awarding punitive damages will not be furthered and thus the punitive damages claim should not be allowed.
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> * * *
>
> "We agree with the bankruptcy judge that the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing. Such a result would be inequitable, and the punitive damages claim was properly stricken."

While the instant appeal was pending before the Alabama Supreme Court, that court held that Alabama law, consistent with *City of Newport*, prohibited punitive damages against a company in receivership:

> "Where the wrongful party is in receivership and the damages are to be paid by innocent creditors, punitive damages create an inequitable result and are therefore improper. First Federal no longer exists and thus cannot be punished. The *deterrent value* of punitive damages is likewise diminished and must be weighed against the realization that *innocent parties will be required to bear the burden* imposed by these damages. It is improper to impose punitive damages upon RTC for conduct attributable to the failed First Federal before RTC was appointed receiver. *Imposing punitive damages against RTC would not accomplish the purposes which punitive damages are meant to serve.* Thus, the trial court was correct in not allowing the assessment of punitive damages against RTC."

Resolution Trust Corp. v. Mooney, 592 So. 2d at 190 (citations omitted; emphasis added).[31]

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[31] *Accord Federal Deposit Ins. Corp. v. Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991) ("inasmuch as the FDIC was created to serve the public interest, the usury claim which is punitive in nature under Texas law, cannot be asserted against the FDIC as such application could have no deterrent effect, and would only serve to punish innocent creditors of the failed institution"), *cert. filed*, 60 U.S.L.W. 3656 (Mar. 5, 1992); *Anderson v. Hershey*, 127 F.2d 884, 887 (6th Cir. 1942) ("The purpose of the punitive double recovery

Also while this appeal was pending, Union's parent, Skopbank, went into Finnish receivership and was nationalized by the Republic of Finland. (App. 46a, 72a-73a, 91a.) Shortly thereafter, the Alabama Supreme Court issued its decision in *Mooney*. Within a week of this decision, Union moved to supplement the appellate record, as authorized by Alabama practice, *see* note 7, *supra*, or in the alternative for leave to supplement the trial record upon remand to include evidence of the post-trial circumstances relevant to the appeal, including evidence of Skopbank's receivership. The Alabama Supreme Court initially granted Union's motion to supplement. Simultaneously with the Opinion, however, the court issued the Reconsideration Order in which it rescinded its prior ruling and denied Union's motion.

Had Union been owned by an American bank in receivership, rather than by a Finnish bank in receivership, *Mooney* would have required a reversal of the punitive damages award. Accordingly, the effect of the decision below is to create a common law classification that grants punitive damages immunity to domestic corporations in receivership, while withholding it from foreign or foreign-owned corporations, such as Union. This classification violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Articles I, XVI, and XVII of the Friendship Treaty between the United States and Finland.

The classification created here discriminates against Finnish-owned corporations (and consequently Finnish taxpayers) solely on the basis of the national origin of the corporation's owners. Such a distinction is constitutionally infirm. Discriminatory state action against per-

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provision, which is to prevent repetition of the offense, does not exist when the bank is in process of liquidation and its activities are being progressively curtailed."); *Professional Asset Management, Inc. v. Penn Square Bank, N.A.*, 556 F. Supp. 134, 136 (W.D. Okla. 1983) ("to award punitive damages against the receiver would be contrary to the theory underlying such awards and would be manifestly unjust").

sons on the basis of national origin is inherently suspect and subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971). It is well established that corporations are persons within the meaning of the Fourteenth Amendment. *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881, n. 9 (1985); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933). Accordingly, the distinction created by the Alabama Supreme Court denying Union immunity from punitive damages awards solely on the basis of its foreign ownership deprived Union of its right to equal protection of the laws.[32]

The result reached by the Alabama courts also violates the Friendship Treaty between the United States and Finland. In all respects relevant here, that treaty requires courts in the United States to accord the same rights and privileges to Finnish corporations as are accorded to U.S. corporations. Article I provides that the nationals of each party "within the territory of the other shall be permitted * * * to carry on every form of commercial activity * * * upon the same terms as nationals of the state of residence in so far as may be permitted by local law." (App. 41a.) Under Article XVII, corporations owned by foreign nationals but incorporated in the United States are entitled to all the benefits of U.S. laws. (App. 43a.) Similarly, Article XVI provides that limited liability corporations organized in accordance with *either* Finnish or U.S. law shall be recognized as such and shall enjoy free access to the courts in both the defense and prosecution of their rights.

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[32] *See Laker Airways Ltd. v. Pan Am. World Airways, Inc.*, 604 F. Supp. 280, 286 (D.D.C. 1984) (holding that the Equal Protection Clause applies to foreign corporations doing business in the United States); *cf. Metropolitan Life*, 470 U.S. at 878 (Equal Protection Clause forbids a state discriminating against residents of other states in favor of own residents); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (foreign corporation entitled to protection of Fifth Amendment).

(App. 42a.)[33] Rather than according Union and Skopbank the same treatment as American corporations, the Alabama Supreme Court created a discriminatory classification in violation of U.S. treaty obligations.

III. THE AFFIRMANCE OF THE VERDICT BELOW CONSTITUTED UNCONSTITUTIONAL MULTIPLE PUNISHMENT FOR THE SAME CONDUCT

This Court should also grant *certiorari* to resolve confusion in the lower courts concerning the important issue whether the imposition of multiple punitive awards upon a defendant violates due process. The Third Circuit and several U.S. districts courts have expressed the view that multiple punitive damage awards may violate the Due Process Clause.[34] For instance, in *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), Judge Weinstein stressed that:

> "It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy

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[33] *See also* Article I (nationals of each party shall enjoy in respect of their property "that degree of protection that is required by international law" and "[t]heir property shall not be taken without due process of law and without payment of just compensation"). (App. 42a.)

[34] *See, e.g., In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283 (D.N.J. 1989); *In re Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 459 U.S. 988 (1982).

> or as a matter of due process, to the amount of times defendants may be punished for a single transaction."

Id. at 728.

The Second and Fifth Circuits, as well as several other district courts, have expressed skepticism concerning whether and to what extent due process imposes limits on the number of times a defendant may be punished for the same course of conduct.[35] In many of these cases, however, the courts were influenced by the absence of evidence demonstrating that prior awards were intended to punish fully the same pattern of conduct.[36]

As shown in Point I.C.4, above, another court has already expressly punished Union in full for the entire "pattern and practice" of conduct alleged in this case.[37] Accordingly, the present case squarely raises the issue whether the imposition of multiple punitive damages can ever violate due process and affords this Court an opportunity to resolve the confusion in this area.

Whatever the appropriate rule may be when it is unclear whether another punitive award was intended as

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[35] *E.g., King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-82 (2d Cir.) *cert. dismissed*, 111 S. Ct. 27 (1990); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465-67 (D. Haw. 1989); *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1306 (D.N.J. 1990).

[36] *E.g., King*, 906 F.2d at 1030; *Simpson*, 901 F.2d at 281; *Germanio*, 732 F. Supp. at 1305; *cf. Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (where prior punitive award "was not intended by the jury to constitute 'full' punishment of defendant's wrongful conduct[,]" a subsequent award "may not necessarily violate the fundamental fairness requirement of the Due Process Clause").

[37] Pursuant to the Alabama Tort Reform Act, an award of punitive damages may not exceed $250,000 in an action for fraud unless it is based upon a "pattern or practice of intentional wrongful conduct." Ala. Code § 6-11-21 (1987). Accordingly, neither the award in *Baker* nor in the case below could have been affirmed unless it were intended to reach the same "pattern or practice."

full punishment for specified conduct, where as here, the other award punished an "entire pattern and practice of conduct" by imposing the "maximum amount" of punitive damages necessary "to accomplish fully society's goals of deterrence and punishment," the dictates of due process are clear. (App. 92a.) In such cases, another punitive award targeting the same pattern and practice of conduct can by definition bear no rational relationship to the furtherance of such goals. If punitive damages can ever cross the line of constitutional unacceptability—and *Haslip* confirms that they can—they cross that line when they seek to punish behavior which has already been fully punished.

IV. THE FAILURE OF THE ALABAMA SUPREME COURT EVEN TO CONSIDER CONSTITUTIONAL ISSUES VIOLATED UNION'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

It is well established that where a federal claim "was raised at the first opportunity," this Court will consider it to have been raised in time regardless of whether the court below considered it properly preserved. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930); *see also Douglas v. Alabama*, 380 U.S. 415, 422 (1965); *Osborne v. Ohio*, 110 S. Ct. 1691, 1704-05 (1990).

Rather than confront Union's substantial constitutional claims, the Alabama Supreme Court simply asserted, without explanation or foundation, that they were not preserved: "no constitutional issues were raised at trial or on motion for new trial." (App. 25a.) To the contrary, Union raised each of its constitutional arguments at the earliest possible opportunity.

Union's constitutional challenge to the judgment is not based on an argument that Alabama's nominal procedures for awarding punitive damages violate Union's due process rights—those procedures were upheld in *Haslip*. Union's challenge is to Alabama's refusal to apply those procedures, and also to its post-judgment creation of a classifi-

cation which impermissibly discriminated against Union on the basis of its parent's national origin. The result was the affirmance of the jury's punitive damages verdict in full, when Alabama procedures, applied in the manner contemplated by *Haslip*, should have resulted in elimination or substantial reduction of those damages. Union's constitutional challenge thus only became appropriate *after* the Alabama courts deviated from their post-verdict constitutional duties. Union challenged each such deviation in a timely manner.

Union also made a timely challenge to the unconstitutional nature of the verdict itself immediately after it was rendered. Union's April 22, 1991 brief in opposition to plaintiffs' motion to confirm the verdict (part IV) argued that the award violated due process:

> "A. The Punitive Damage Award Assessed In This Case Transcends The Bounds Of Fundamental Fairness
>
> * * * *
>
> "B. Union's Exposure To Successive Punitive Damage Awards In Subsequent Cases Violates Its Due Process Rights"

(App. 60a-61a.) That Union raised this issue in that brief rather than in its new trial motion is irrelevant for preservation purposes. *See, e.g., Douglas v. Alabama*, 380 U.S. 415, 422 (1965). Union appropriately brought its contention of potential constitutional error to the attention of the trial court in the very proceeding that is supposed to assure that punitive damages awards comport with constitutional requirements. Nothing more is required to preserve such arguments for this Court.

Union could not have raised its constitutional objections earlier than it did. By nevertheless refusing to consider them, the Alabama Supreme Court deprived Union of due process of law. *Brinkerhoff-Faris*, 281 U.S. at 678.

CONCLUSION

For the foregoing reasons, Petitioner requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Released Jan. 10, 1992]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

1901350

UNION MORTGAGE COMPANY, INC.

v.

WILLIE MAE BARLOW and WILLIE J. GALY

Appeal from Lowndes Circuit Court
(CV-89-22)

PER CURIAM.

This is an appeal from a judgment on a jury verdict in favor of the plaintiffs, Willie Mae Barlow and Willie J. Galy, in the amount of $6,153,000. The case raises questions of whether there was a prejudicial failure of prospective jurors to accurately answer questions on *voir dire*; whether the verdict failed to follow the court's instructions or was inconsistent; whether the evidence supported the verdict; and whether the award of punitive damages was excessive or otherwise improper.

The plaintiffs sued Union Mortgage Company, Inc. ("Union Mortgage"), American Home Improvement Services of Alabama ("American Home"), and Ronald Sellers, President of American Home, alleging fraud, conspiracy, and breach of contract relating to a home improvement loan; they requested damages in the amount of $4,500,000. A suggestion of bankruptcy by Ronald Sellers, doing busi-

ness as American Home, was filed, and the action against Union Mortgage was severed from the action against American Home and Sellers. Union Mortgage filed an answer denying the plaintiffs' claims and asserting the affirmative defenses of estoppel and *in pari delicto*. Union Mortgage also filed a counterclaim for $6,250,000, alleging that the plaintiffs had committed fraud, conspiracy, and breach of contract.

The facts and arguments in this case are lengthy. Therefore, it is necessary to briefly describe the parties and their roles in the home improvement loan at issue in this case.

American Home was principally in the business of performing home improvements. The evidence would support a finding that American Home performed home improvement contracts on credit only if Union Mortgage agreed in advance to lend the homeowner money for the repairs, with the loan secured by a mortgage on the house. The evidence showed that Union Mortgage actually approved the loans and that it took an immediate assignment of the mortgages at a substantial discount plus a fee. Neither the discount nor the fee was disclosed to the mortgagor. Union Mortgage then sold these mortgages to other financial institutions for substantially more than the discounted credit that it had actually extended.

Willie Mae Barlow, a woman living in Hayneville, Alabama, applied for and obtained such a loan for an amount substantially larger than the value of the improvements for which the loan was supposed to be used. As part of the transaction, she executed a deed conveying her house to herself and her son Willie J. Galy, whose income was required for approval of the loan and who joined her in executing the mortgage. Barlow had five other children, and she testified that she would not have deeded her property to her son Galy if she had been informed of the effect of the document she was signing.

The plaintiffs presented two alternate theories of relief at trial as to the fraud claim. First, the plaintiffs claimed that Union Mortgage had commited fraud through American Home as its agent.

The plaintiffs argued that all the documents reflected that credit was being extended to the homeowner by the contractor, such as American Home, for home repairs. They contended that the home repairs were worth substantially less than the amount of the loan. According to the plaintiffs, the contractor immediately assigned the mortgage to Union Mortgage. Union Mortgage then "chopped" a percentage off the face amount of the loan. Union Mortgage told the contractor the amount of the discount but did not tell the customer. The plaintiffs claimed that Union Mortgage made its money from the discount and the profit from the subsequent sale of the mortgage. The contractor, they contended, made money from the inflated price of the home repairs. The result for the customer was that she owed money on a home improvement loan for which she did not receive the full value of the loan. The plaintiffs argued that Union Mortgage devised this scheme to commit fraud against all its customers and had been committing fraud since its formation in 1982. They note that Union Mortgage and American Home had engaged in 84 similar transactions in Alabama.

Second, the plaintiffs argued that Union Mortgage had committed fraud directly against its customers. The plaintiffs contended that Union Mortgage was the primary lender and, as such, should have disclosed the "chop" or discount to the customer. The plaintiffs argued that Union Mortgage was the primary lender because it made all of the credit decisions and actually funded the loan.

Union Mortgage points out that it is common practice to buy and sell commercial paper. Most of the commercial paper purchased by Union Mortgage was related to home improvement loans and it bought these papers at

a discount. Union Mortgage argued that a discount or a "chop" is common in the banking industry. Union Mortgage claimed that it was a secondary lender, and, as such, was not required to inform the customer of the discount.

Union Mortgage contended that American Home was not its agent. Union Mortgage asserted that it bought only about 50% of American Home's commercial paper and was not contractually bound to buy any of its commercial paper. The evidence was also susceptible to the construction, however, that Union Mortgage approved 50-60% of the loan applications submitted by American Home, and there was no evidence that American Home submitted loan applications to any other financer or performed repairs for any of the applicants for whom Union Mortgage denied credit. Union Mortgage claimed that American Home and Barlow conspired to falsely indicate that the loan for the home repairs was substantially greater than the amount of money actually lent. Union Mortgages contended that it never made any misrepresentations to Barlow, but that Barlow misrepresented material facts to Union Mortgage prior to its purchase of her mortgage. Union Mortgage claimed that it relied on those fraudulent misrepresentations and was thereby damaged.

With that general statement of the parties, the claims, and the defenses in mind, we turn to a detailed statement of the facts. Because the jury returned a verdict for the plaintiffs, we are bound to assume that the jury drew all inferences favorable to the plaintiffs that the evidence will support.

The undisputed facts in this case are as follows: On August 2, 1988, Willie Mae Barlow and her son, Willie J. Galy, signed a contract with American Home for $8,000 in home repairs. The loan was secured by a mortgage on Barlow's house. The repairs to be done on Barlow's house were as follows: (1) install vinyl in the kitchen and hall; (2) paint, scrape, and trim the exterior of the house; (3) install two storm doors; and (4) repair plumbing in the bathroom. The annual percentage rate on the loan was

17.98% which made the total amount of payments due on the loan $17,284.80 over its 10-year term. Barlow and her son then executed a mortgage on Barlow's house to American Home on August 2, 1988, which American Home immediately assigned to Union Mortgage in the same document. Union Mortgage paid American Home $7,075 for the mortgage. That is, Union Mortgage discounted the $8,000 loan by 10% and charged a $125 fee. Subsequently, Union Mortgage sold the mortgage to the Mitsui Bank of Japan for $7,975.93.[1]

Barlow testified at trial that she applied for a $2,000 loan with American Home in 1987 and was turned down. Barlow needed the money to pay her daughter's medical bills. In late July 1988, Ida Sellers of American Home contacted Barlow and told her that her loan application had been reviewed again and that she was eligible for a loan.

On August 2, 1988, Nell Stanberry, of American Home, contacted Barlow and told her that Union Mortgage could lend her money only if American Home could make some repairs on her house. Although Barlow did not need any repairs on her house, which was built in 1985, she agreed to let American Home make a few repairs in order to get the needed loan. At the time, Barlow was delinquent on her loan payments to the Farmers Home Administration, which had financed the building of her house and which held a first mortgage on the house. American Home paid the delinquent mortgage payment for Barlow in order for Barlow to qualify for the home repair loan. Barlow signed several incomplete documents, including an $8,000 loan contract and a mortgage to American Home containing an assignment to Union Mortgage. Barlow also signed a financial disclosure statement for Union Mortgage, which enabled Union Mortgage to find out

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[1] Union Mortgage repurchased the mortgage from Mitsui Bank after Barlow defaulted on the payments. American Home then repurchased the mortgage from Union Mortgage.

Barlow's wages as a maid. Barlow and her son signed the documents on August 2, 1988, but did not have a chance to review them because Stanberry was "in a hurry to return to Birmingham." Stanberry told Barlow that she would complete the documents and mail them to her.

On August 3, 1988, Barlow decided that her house did not need $6,000 in repairs. However, on that date, repairmen from American Home arrived at Barlow's house; they told her that it was too late to rescind the contract. The repairs were made that date and shortly thereafter, Ida Sellers called Barlow and told her that she would be receiving a check for $2,000. Sellers stated that American Home was supposed to do only home repair and could not directly lend Barlow any money, and, therefore, that the $2,000 check had to be payable to a third party. Barlow told Sellers to make the check payable to a friend of Barlow's.

On August 11, 1988, American Home mailed the then-completed documents to Barlow. The documents signed by Barlow and Galy were a home improvement retail installment contract, a security agreement, a disclosure statement, a credit application, a mortgage, and a quitclaim deed. Barlow stated that she did not realize that she had signed a quitclaim deed giving title to her house to herself and her son. The loan contract stated that the last day to rescind the contract was August 5, 1988. Barlow did not know about the right to cancel until it was too late, because American Home did not mail the contract until August 11, 1988.

On August 12, 1988, Barlow filled out a completion certificate for Union Mortgage, stating that all the repair work had been done. A representative of Union Mortgage telephoned Barlow to see if all the repairs had, in fact, been done. Barlow responded to all the questions by the Union Mortgage representative, answering them as Nell Stanberry had instructed her to do. Specifically, Barlow told the Union Mortgage representative that the home

repair work had been completed to her satisfaction and that all the loan proceeds had been used for home repair. On cross-examination, Barlow admitted that she had said that the entire $8,000 loan was used for home repairs, as she had been instructed to do.

Barlow was unable to make the scheduled payments to Union Mortgage because of her limited income. According to Barlow, a representative of Union Mortgage telephoned and threatened to "kick her butt out in the street" if the payments were not made.

A former branch manager for Union Mortgage, Paul Cannon, testified, in a deposition that was read at trial, that Union Mortgage set quotas for the number of home improvement loans to be generated from each branch.

William D. Crosby, a former national bank examiner, testified that American Home could be the agent of Union Mortgage because American Home was totally dependent on Union Mortgage for financing the loans. Crosby stated that Union Mortgage could also be considered as the primary lender in regard to this loan. Crosby stated that there is a difference between a primary lender and a secondary lender. He testified that a primary lender makes the credit decision, notifies the borrower of rejections, establishes the discount on the loan at the time the loan is made, and charges an origination fee on loans, all of which Union Mortgage had done in this case. He also stated that he had never seen a case where a discount was set by a secondary lender prior to funding the loan, which is what Union Mortgage claims was its role. He also testified that a primary lender is required by the federal Truth-in-Lending Act to disclose the discount and the origination fee as part of the finance charge.

An expert in banking, Benton Gup, testifying for Union Mortgage, said that Union Mortgage was a secondary lender that purchased Barlow's loan. Gup stated on cross-examination that if Union Mortgage had been the

primary lender then it would have been required to disclose to the borrower the amount of the discount and any origination fee.

Union Mortgage's executive vice-president, James Borschow, testified that, before purchasing a mortgage, Union Mortgage followed a verification process. The process included a completion certificate and a telephone conversation between Union Mortgage and the customer. According to Borschow, the purpose of this process is to ensure that the customer is satisfied with the repair work and to ensure that all the proceeds of the loan went for home repairs. Borschow testified that Union Mortgage bases its decision on whether to purchase the mortgage on this verification process. He stated that if Barlow had admitted that she expected to receive $2,000 cash from the loan, then Union Mortgage would not have purchased her mortgage.

In order to show that the defendants had engaged in an alleged pattern, practice, or scheme of generating inflated mortgages without regard for the effect of the transaction on the mortgagor, the plaintiffs introduced evidence of similar transactions in which American Home generated mortgages for Union Mortgage.[2] In the spring of 1988, Lucinda and Elijah Rudolph entered into such a transaction. This transaction led to one of the first jobs performed by American Home with financing by Union Mortgage; American Home had received approval as a Union Mortgage dealer in March 1988. When Vicki Herd, a Union Mortgage employee, telephoned Lucinda Rudolph at 4:05 p.m. on Friday, May 6, 1988, Herd taped the conversation, with Rudolph's permission. The transcript of that tape includes the following:

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[2] Union Mortgage characterized the transaction in this case as a purchase by it in the secondary mortgage market of a loan and mortgage created by American Home as the primary lender. As we have shown, the evidence would sustain a finding that Union Mortgage was the primary lender.

"[Herd]: Okay, we show the amount that you paid for the improvement work to be $6,000.00. Is that correct, ma'am?

"[Rudolph]: $6,000.00!

"That's what I'm showing on the contract . . . . Is that not correct?

"I'm not sure. I thought the loan payment was about $4,700.

". . . .

"Okay, what I'm going to do, as soon as we hang up the phone, I'm going to contact American Home Improvement, or actually what I'll do, is that we have a branch that's located in your area that they work with, and they'll be in contact with American Home Improvement and let them know that you don't have a copy of your contract and from what you can recall, the amount was a lot less. But, you know, of course, you aren't sure, you know. But we'll see—you know, but we'll get them to get a copy of your contract out there to you so we can verify this information. Okay? Now, we'll go ahead and wait to set up your due date then until we get this finalized, because there's, you know, there's really no sense, you know, setting up a due date, you know, if we're going—

"When you get it straight, do you have an idea when I'll be receiving checks?

"When you'll be receiving a check?

"Uh, huh.

"Okay, what check are you supposed to be receiving, ma'am?

"I—it was about the loan, I guess—I thought.

"Okay, all right. When you talked with American Home Improvement did they promise to send your, or, you know, that we would or they would send you a check of some sort? Is that what you're thinking?

"I was thinking it was a loan besides the fixing of the house, and I thought there would be something

in it—else, in it for me. That's what I thought. I thought I was making a loan.

"Okay, did they tell you how much that was going to be, because I'm not familiar with that. Our contract isn't broke out that way. Which, you know, doesn't mean that that's not the way they were going to do it, just that that's not the way my contract is broke out.

"I don't know what it was supposed to be. I was just waiting to hear from somebody.

"Okay, and you were under the impression that the money—some of the money was used to do your home improvements and some of the money was supposed to come back to you. Is that correct?

"That's what I thought.

"Okay. Well, I'll let them know that too, because as far as my work information here, the loan documents that I have, it did not show that, you know, that there were monies, you know, to be given back to you.

"Oh, okay.

"Do you have your work order handy at all, or do you have—

"No, I don't have anything.

"You don't have any paper work whatsoever?

"No.

"Okay, we'll get in touch with American Home Improvement and get you some paper work to go by and have them, you know, explain, you know, a little bit better to you, you know, what the situation is, because obviously, they really didn't, you know, they really didn't leave the information with you which they should have. Okay?

"Okay.

"Well, that's all I can do for right now, and we'll be back in touch with you again, and if you could keep the number that you just called, and as soon as you have that information in front of you, if you would give us a call, please. Collect again.

"Okay. The work that is done, it looks nice.

"Okay, good. Okay, well, just give us a call as soon as you get that paper work in front of you and we'll also try to get ahold of you."

Thus, in one of its first transactions with American Home, Union Mortgage had clear information that American Home had not left any documents with the mortgagor, that the improvements were not worth the amount of the loan, and that the mortgagor expected to receive cash proceeds from the loan. In spite of this information, Union Mortgage had its Birmingham office communicate with American Home, not directly with Mrs. Rudolph. On the Monday morning after the above-transcribed Friday afternoon conversation, Nell Stanberry, of American Home, met Mrs. Rudolph at Mrs. Rudolph's place of work. Mrs. Rudolph then telephoned Union Mortgage and gave the "correct" information—that the repairs were worth the amount of the loan and that she expected no cash from the loan. These facts support the plaintiffs' theory that Union Mortgage directly participated in the fraud, if only because it took no direct action of its own to effectively prevent what it now claims to have been a violation of its practices.

Furthermore, the inference that Union Mortgage was aware that American Home's repair prices were inflated and that it gave cash payments[3] is supported by the testimony of Susie Shuford. Mrs. Shuford and her husband borrowed money for repairs to their house and to buy a septic tank. She testified that Stanberry told her the repairs would be $1900 and that she would receive $6800. The mortgage amount was $8900. She said that Walter Sellers,[4] Ida Sellers,[5] and Nell Stanberry all told

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[3] Union Mortgage persisted at trial and on appeal in referring to the cash payments as "kickbacks."

[4] A Lowndes County resident who had referred Barlow and several of her witnesses to American Home for cash loans.

[5] An employee of American Home.

her she was dealing with Union Mortgage, that the money came from Union Mortgage, and that Walter Sellers brought her $1000 cash. In its underwriting process whereby it approved the loan, Union Mortgage discounted the loan 21%. Most important for the point here, Union Mortgage discovered during its inquiries regarding approval of the loan that there was a $2542.95 judgment lien against the Shufords' property. James Borschow, the executive vice president of Union Mortgage who was in charge of branch operations at the time of these mortgages, testified that in the case of the Shuford mortgage, Union Mortgage funded the loan and American Home paid the lien out of its portion of the proceeds. Borschow testified that American Home probably made very little profit out of the Shuford transaction, but the very fact that Union Mortgage assumed its dealer could absorb a $2500 charge out of an $8900 loan belies its contention that it reviewed the loan applications for excessive charges to the mortgagors.

At the conclusion of the trial, the jury found in favor of the plaintiffs an all three of their claims. As to the fraud claim, the jury awarded the plaintiffs $150,000 in compensatory damages and $6,000,000 in punitive damages. The jury awarded $1,000 in compensatory damages and $1,000 in punitive damages on the conspiracy claim. On the breach of contract claim, the jury awarded $1,000 in compensatory damages.

Union Mortgage filed a motion for a JNOV, a new trial, or a remittitur. The trial court denied the motion and entered an order pursuant to *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), holding that the verdict was not excessive.

Did the trial court err in failing to grant a new trial based on alleged juror misconduct?

Union Mortgage claims that the trial court abused its discretion in failing to grant a new trial based on seven

jurors' alleged failure to accurately respond to questions on *voir dire*. Union Mortgage claims that seven of the jurors knew key witnesses for the plaintiffs. The affidavits of jurors Mary Edwards, Tammy Bandy, Bessie McMeans, Comer Taylor, Eugene Oliver, Lula Gordon, Rosebud Hall, and Eddie Reese were considered by the trial judge, along with the court reporter's transcript, in determining whether Union Mortgage may have been prejudiced by the jurors' conduct.

Parties involved in litigation are entitled to true and honest answers from prospective jurors in order to help them exercise their discretion in the use of peremptory strikes and, when jurors fail to answer questions correctly, the parties are denied the exercise of that right. *Martin v. Mansell*, 357 So.2d 964 (Ala. 1978). The proper inquiry on a motion for a new trial based on improper or non existent responses to *voir dire* questions is whether the response, or the lack of response, resulted in probable prejudice to the movant. *Freeman v. Hall*, 286 Ala. 161, 238 So.2d 330 (1970). Not every failure of a prospective juror to respond correctly to a *voir dire* question will entitle the losing party to a new trial. *Wallace v. Campbell*, 475 So.2d 521 (Ala. 1985).

The determination of whether the complaining party was prejudiced by a juror's failure to answer *voir dire* questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. *Freeman, supra.* Some of the factors that this Court has approved for using to determine whether there was probable prejudice include: "temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." *Freeman*, 286 Ala. at 167, 238 So.2d at 336.

In the instant case, the record reflects that these seven jurors stated that they had no personal relationship with any of the witnesses. All of the seven jurors indicated that they merely "knew of" some of these witnesses. Indeed, there seems to be no relationship between the witnesses and the jurors other than a casual acquaintance. The record also shows that some of the jurors did in fact raise their hands when asked by Union Mortgage's counsel whether they knew certain witnesses. Clearly, there was no abuse of discretion by the trial court in denying the motion for a new trial based on alleged juror misconduct.

Did the trial court err in failing to grant a new trial based on inconsistent verdicts or the jury's failure to follow the court's instructions?

The trial court submitted to the jury the question of whether American Home and its agents were acting as agents of Union Mortgage in doing the allegedly wrongful acts that were the subject of the complaint and of the plaintiffs' evidence. After instructing the jury on the law of agency, the law of fraud, and other pertinent law, the court instructed the jury on how to return its verdict. It gave the following instruction on count one:

> "[I]n count one, [which] is the fraud claim, if you are reasonably satisfied that American Home and the Sellerses were acting as agents of Union Mortgage and that they were committing a fraud and that Mrs. Barlow was damaged as a proximate result of that fraud, then she would be entitled to a verdict at your hands on the fraud count."

The court's charge on the law of conspiracy had included the following:

> "Now, it is also the law that a corporation cannot be guilty of conspiring with its agents who are acting within the line and scope of their employment. It's just impossible the law says for the master to con-

> spire with its agent because they are one [and] the same."

On count two, the court charged the jury:

> "[I]f you find that American Home and the Sellerses were the agents of Union Mortgage then you'd not be able to find for Mrs. Barlow on the [sic] count two. But if you find that they are not the agents of Union Mortgage and you are reasonably satisfied from the evidence of the conspiracy then your verdict would [be in favor of the plaintiffs on count two]."

The court also instructed the jury how to return a verdict on the contract count. After these instructions, the court said: "Now, let me remind you that we must have a verdict whether it's for the Plaintiff or for the Defendant on each one of those three claims." It also instructed the jury to return a verdict on the fraud and conspiracy counts of the counterclaim.

After the jury had deliberated for about 45 minutes, it returned to the jury box, and the following then transpired:

> "The Court: Go ahead and sit down.
>
> "All right. Ladies and gentlemen, have you reached a verdict?
>
> "The Foreperson: Yes, we have.
>
> "The Court: May I have it please? Thank you. You may be seated.
>
> "Now, ladies and gentlemen, I thought I had made it clear that we have to have a verdict on each one of these claims. You have furnished me with a verdict on one of the claims but there are—on two of the claims, but there are two others that you need to furnish me with a verdict on. And if you will, if you will return to the jury room and furnish me with a verdict on the conspiracy count and the breach of contract count. You need to go back into the jury room to do that."

After further deliberations, the jury returned verdicts for the plaintiffs on counts two and three of the complaint. It is apparent from the judge's remarks that the initial verdict was for the plaintiffs on the fraud claim and on both counts of the counterclaim. The jury awarded damages on the three counts of the complaint as follows: on the fraud count, $150,000 compensatory damages and $6,000,000 punitive damages; on the conspiracy count, $1,000 compensatory damages and $1,000 punitive damages; on the contract count, $1,000 compensatory damages.

As a ground for its motion for new trial, Union Mortgage argued that the verdict for the plaintiffs on the fraud count was inconsistent with the verdict for the plaintiffs on the conspiracy count and that, in returning these two verdicts, the jury had failed to follow the trial court's instructions. The plaintiffs respond to the same issue on appeal, in part, by arguing that Union Mortgage's objection came too late.

This Court has held that an inconsistent-verdict issue can be raised for the first time on a motion for new trial if the objection is to the substance or the inconsistency of the verdict, not to the forms submitted to the jury for its verdict. See *Barnes v. Oswalt*, 579 So. 2d 1319 (Ala. 1991) (per Hornsby, C.J., with three Justices concurring and one Justice concurring in the result); *A.L. Williams & Assocs., Inc. v. Williams*, 517 So. 2d 596 (Ala. 1987); *Stinson v. Acme Propane Gas Co.*, 391 So. 2d 659 (Ala. 1980); *Lewis v. Moss*, 347 So. 2d 91 (Ala. 1977).

Any infirmity in the verdict in this case, however, was caused by the trial court's instructions that the jury should return to the jury room for further deliberation on the conspiracy count. Under the instructions given to it before it began deliberations, the jury's initial verdict for the plaintiffs on the fraud count necessarily precluded a verdict for the plaintiffs on the conspiracy count. When the jury returned its verdict for the plaintiffs on the fraud count, therefore, the court should have accepted

that as a verdict for the defendants on the conspiracy count and sent the jury back for further deliberations only on the contract count. Alternatively, in sending the jury back for a signed verdict on the conspiracy count, the trial court should have reminded the jury of its instructions that it could not return a verdict for the plaintiffs on both the fraud count and the conspiracy count.

This error is easily cured by striking the verdict on the conspiracy count. Although judgments on inconsistent verdicts are ordinarily reversed without speculation as to what the jury intended, see *A.L. Williams & Assocs.* and the other cases cited *supra*, this Court has also, when appropriate, affirmed a judgment based on inconsistent verdicts conditioned upon a remittitur. In *Farmers & Merchants Bank of Centre v. Hancock*, 506 So. 2d 305 (Ala. 1987),[6] the bank sued its borrower and the borrower's guarantor for a deficiency judgment regarding the sale of collateral securing a note, and the defendants counterclaimed, alleging a wrongful repossession and a commercially unreasonable sale. The jury found for the defendants on both the complaint and the counterclaim, awarding actual damages of $98,000, punitive damages of $30,000, and mental anguish damages of $20,000. This Court held that an award of damages on the claim of a commercially unreasonable sale was precluded by the finding, inherent in the defendants' verdict on the complaint, that there had been an accord and satisfaction. The Court held that the actual damages could not be apportioned between the two counts of the counterclaim, but that the punitive and mental anguish damages were attributable only to the wrongful repossession claim. Therefore, the Court held, the judgment could be affirmed if the counterclaimants accepted a remittitur of the entire $98,000 in actual damages.

In *Barnes v. Dale*, 530 So. 2d 770, 778 (Ala. 1988), this Court said:

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[6] Opinion extended, 510 So. 2d 201 (Ala. 1987).

> "The authority of an appellate court to direct a judgment contrary to the jury's verdict is grounded in statutory and common law. Code 1975, § 12-22-70, which is a mere codification of the court's inherent power, states that the appellate court may, 'upon the reversal of any judgment or decree remand the same for further proceedings or enter such judgment or decree as the court below should have entered or rendered, when the record enables it to do so.' This authority is historically supported. See *Henry v. White*, 222 Ala. 228, 131 So. 899 (1931); *First Nat. Bank of Stevenson v. Crawford*, 25 Ala. App. 463, 149 So. 230, *cert. den.*, 227 Ala. 188, 149 So. 228 (1933); *Campbell v. Tucker*, 26 Ala. App. 100, 154 So. 821, *cert. den.*, 228 Ala. 658, 154 So. 825 (1934); *Wilkes v. Stacy Williams Co.*, 235 Ala. 343, 179 So. 245 (1938); *Drummond v. Franck*, 252 Ala. 474, 41 So. 2d 268 (1949); and *Haden v. Lee's Mobile Homes, Inc.*, 41 Ala. App. 376, 136 So. 2d 920 (1962)."

Similarly, Ala. Code 1975, § 12-22-71, codifies the power of an appellate court to affirm a judgment conditioned on the plaintiffs' acceptance of a remittitur where the only ground for reversal is that the judgment of the lower court is excessive.

In this case there is no need for speculation: the jury, by its first verdict, clearly indicated a finding that American Home and its agents were acting as agents of Union Mortgage. That verdict was consistent with the later verdict for the plaintiffs on the contract count. Any confusion was engendered only by the court's sending the jury for further deliberations on the conspiracy count without reminding it of the earlier instructions that it could not return a verdict for the plaintiffs on both fraud and conspiracy. Indeed, the judge himself seems not to have had those earlier instructions in mind either when he sent the jury back on the conspiracy count or when he accepted its verdict on that count. That being the case, we

cannot fault the jury for forgetting those instructions or penalize the plaintiff by reversing the judgment on this ground.

For these reasons, we hold that any error presented by this issue can be cured by a remittitur of the $2,000 award on the conspiracy count. There was evidence to sustain a finding for the plaintiffs on either the fraud count, or the conspiracy count, or both, depending upon how the jury viewed the evidence. Nevertheless, in view of the judge's charge, we will remit the amount awarded on the conspiracy count. Therefore, as to this issue, we hold that it presents no basis for reversal, provided the plaintiffs accept a remittitur of $2,000 of the judgment.

Was the jury's award of punitive damages excessive under the facts of this case?

The jury awarded the plaintiffs $6,001,000 in punitive damages. Although, there is a statutory cap of $250,000 on punitive damages awards based on fraud, there are exceptions. § 6-11-21, Ala. Code 1975. One exception is when the defendant has engaged in "a pattern and practice of intentional wrongful conduct, even though the damage or injury was inflicted only upon the plaintiff." § 6-11-21(1). There was ample evidence presented to support the trial court's determination that Union Mortgage engaged in a pattern and practice of intentional wrongful conduct.

We must now decide if the punitive damages award was excessive. The following is the order entered by the trial court after an extensive hearing pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and its progeny:

> "This cause coming on to be heard before this Court on April 8, 1991, on plaintiffs' Motion for Punitive Damages Hearing based upon the award of punitive damages by the jury in this case on March 1, 1991.

"On March 1, 1991, the jury returned a verdict in this case in favor of the plaintiffs and against the defendant, Union Mortgage Company, Inc., a corporation (hereinafter Union Mortgage). Under Count One of plaintiffs' complaint for fraud, the verdict was rendered for compensatory damages in the amount of $150,000.00 and punitive damages in the amount of $6,000,000.00; under Count Two of plaintiffs' complaint for civil conspiracy the verdict was rendered, for compensatory damages in the amount of $1,000.00 and punitive damages in the amount of $1,000.00; and under Count Three of plaintiffs' complaint for breach of contract the verdict was rendered for compensatory damages in the amount of $1,000.00. On March 4, 1991, this Court entered a judgment on the verdict in the total amount of $6,153,000.00.

"Pursuant to the request of the plaintiffs a hearing was conducted by this Court on April 8, 1991, in accordance with the provisions of Section 6-11-23(b), Code of Alabama, 1975, as amended, and pursuant to the recent decisions rendered by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Company v. Hornsby*, 539 So. 2d 218 (Ala. 1989); and *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991).

"During this hearing the Court heard relevant evidence submitted by both the plaintiffs and the defendant regarding the economic impact of the verdict on the defendant, the amount of compensatory damages awarded, the amount of punitive damages awarded, other similar acts of the defendant, efforts of the defendant to make remedial changes to prevent the occurrence of similar acts in the future, the opportunity of the defendants to remedy any wrong as to the plaintiffs, the complicity of the plaintiffs, as well as other relevant evidence.

"This Court has taken into account that punitive damages should bear a reasonable relationship to potential harm from the defendant's actions as well as to the actual harm caused by the defendant.

"This Court has also considered what degree of reprehensibility should attach to the conduct of the defendant in this case. The factors used by the Court in determining the degree of reprehensibility include the wrongfulness of the conduct, the duration of the conduct, the degree of the defendant's awareness of any actual or potential harm occurring or likely to occur as a result of its conduct, and any attempted concealment of the harm, along with similar past conduct, if any, and it[s] frequency.

"In rendering its findings, this Court considered the evidence admitted in the trial of this case and the evidence submitted by the parties at the hearing conducted on April 8, 1991.

"There is ample evidence to support the verdict for the plaintiffs for compensatory damages under the fraud Count of $150,000.00 due to intentional fraud concerning the plaintiffs' home. Furthermore, there is clear and convincing evidence to support a finding by the jury that the defendant consciously or deliberately engaged in fraud with regard to the plaintiffs. The issue to be determined is whether the punitive damages award of $6,001,000.00 is appropriate and justified by the evidence.

"Having considered the evidence presented at the trial of this case and at the hearing conducted by this Court on April 8, 1991, this Court finds that the award of punitive damages in the total amount of $6,001,000.00 is not excessive and is appropriate for the reasons that follow.

"The evidence supports the finding that the magnitude and scope of the fraudulent scheme conducted

by the defendant is substantial. The defendant engaged in a pattern and practice of intentional fraud affecting citizens throughout the State of Alabama and indeed the continental United States. The object of the defendant's fraudulent scheme is the enrichment of the defendant and its shareholder by means of preying upon the poor and unsophisticated. This object is accomplished by obtaining a mortgage on the victim's home for a consideration substantially less than stated in the mortgage and disclosure statement. This Court finds that the manner in which the defendant conducts its business presents a continuing risk of harm to the public and serves no legitimate business purpose.

"This Court finds that the award of the jury is not excessive considering the economic impact on the defendant. The most recent financial statements for December 31, 1990, of the defendant Union Mortgage has interest income derived from its mortgage portfolio of approximately $30,863,000.00 for 1990. The sole shareholder of the defendant Union Mortgage is Skopbank located in Helsinki, Finland. Skopbank controls Union Mortgage. Until his death in February, 1991, Union Mortgage's Chief Executive Officer was a Finnish citizen and Skopbank officer sent by Skopbank to manage Union Mortgage. Skopbank continued to pay a portion of Union Mortgage's Chief Executive Officer's salary. The evidence shows that Skopbank continued to control the affairs of its U.S. subsidiaries, including Union Mortgage.

"The Court has considered the economic relationship between Skopbank and its wholly-owned subsidiary Union Mortgage. Skopbank has extended to Union Mortgage an unsecured line of credit totalling $550,000,000.00 through a wholly-owned United States holding company. Union Mortgage did not produce any documents which reflect any obligation to

repay the money advanced under the 'line of credit.' Based upon the evidence presented at the hearing on April 8, 1991, this Court finds that a substantial portion of the $550,000,000.00 represents a contribution of capital by Skopbank of Helsinki, Finland, to its wholly-owned subsidiary Union Mortgage. The most recent available consolidated financial statement presented for Skopbank of Helsinki, Finland, for December 31, 1989, reflects that Skopbank realized income from the operation of Union Mortgage of approximately $12,600,000.00 (U.S. dollars).

"The jury was justified in awarding sufficient damages to prevent similar wrongs in the future especially in light of the fact that the verdict in this case would have little impact on the defendant unless it is substantial. The Court's understanding of the purpose of awarding punitive damages is to punish the wrongdoer and deter others from similar wrongful conduct in the future. The verdict in this case should be large enough to deter this type of conduct. The verdict will punish the defendant but at the same time the verdict is not so large as to unduly burden the defendant based upon the evidence before this Court. Therefore, the Court finds that the punitive award in the total amount of $6,001,000.00 is not excessive.

"The jury awarded compensatory damages in the total amount of $152,000.00. This award is supported in part by the evidence at trial of this case that plaintiff Willie Mae Barlow was made to suffer mental anguish due to the oppressive conduct of the defendant. This Court finds that the punitive award is consistent with the amount of the compensatory damages awarded by the jury.

"The evidence supports a finding that defendant has engaged in the same conduct constituting fraud from Union Mortgage's inception in 1982 until the

present. Evidence in the hearing of April 8, 1991, established that as recently as April 1, 1991, the defendant has made no effort to change the manner in which it conducts business. Furthermore, the defendant's president admitted at the hearing of April 8, 1991, that the defendant's business is being conducted in the same manner.

"The evidence supports a finding that the defendant had ample opportunity to remedy the wrong committed by it against the plaintiffs and others similarly situated, but the defendant failed to do so. Testimony before the Court during the hearing of April 8, 1991, established that the manner in which the defendant conducts its business will always result in harm to the customer due to the fact that there is no disclosure of the 'chop'. The wrong committed by the defendant cannot be remedied as long as the defendant continues to do business in the manner in which it is being done even until April 8, 1991.

"Accordingly, based upon the findings set forth herein, this Court finds that the punitive damages award is not excessive, and the punitive damages award of the jury in the amount of $6,001,000.00 is sustained.

"DONE and ORDERED this 26th day of April, 1991.

"/s/ Arthur E. Gamble
"CIRCUIT JUDGE"

In reviewing the punitive damages award in this case, the trial judge stated the reasons why the verdict should not be remitted. After a thorough review of the record, we hold that the facts aptly support the trial court's decision. We think it is interesting to note that in its counterclaim, Union Mortgage sued the plaintiffs for over $6,000,000 in punitive damages. Quite possibly, the jury viewed this amount as an appropriate measurement of

the amount necessary to punish and deter Union Mortgage.

We note that no constitutional issues were raised at trial or on motion for new trial.[7] Therefore, we do not address any constitutional issues regarding the imposition of punitive damages in this case.

We find Union Mortgage's argument that there was insufficient evidence to support the verdict to be without merit.

Based on the foregoing, the judgment of the trial court is due to be affirmed on the condition that the plaintiffs accept a remittitur of the $2,000 of the judgment that is attributable to the verdict on the conspiracy claim within 28 days of the date of this opinion, January 10, 1992, which will result in a judgment for the plaintiffs in the amount of $6,151,000.

AFFIRMED CONDITIONALLY.

Hornsby, C. J., and Maddox, Almon, Shores, Adams, Kennedy, and Ingram, JJ., concur.

Houston and Steagall, JJ., concur specially.

HOUSTON, JUSTICE (concurring specially).

I will vote to permit the plaintiffs to be compensated, even though their wrong contributed to their loss. However, I refuse to allow the plaintiffs to be rewarded for their misdeeds. Consequently, I will not vote to award them any punitive damages, because this would be a reward for those misdeeds. However, this does not mean that the defendant should not be required to pay the amount of punitive damages assessed against it.

The trial court found that the punitive damages assessed against the defendant did not violate its right to due process or other constitutional rights. With the rec-

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[7] The appellant's counsel on appeal were not its trial counsel.

ord before us, I cannot hold that the trial court erred. Therefore, I would affirm the amount of the punitive damages award; however, after the deduction of expenses and attorney fees, I would direct that the balance of the punitive damages award be paid to the General Fund of the State of Alabama to be used for the public good.

Steagall, J., concurs.

APPENDIX B

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

445 Dexter Avenue
Montgomery, AL 36130

Telephone: 242-4609

Re: 1901350

Union Mortgage Company, Inc., Appellant vs. Willie Mae Barlow, et al., Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—— Appeal docketed. Future correspondences should refer to the above number.

—— Court Reporter granted additional time to file reporter's transcript to and including

—— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

—— Appeal —— granted 7 additional days to file briefs to and including

—— Appellant(s) granted 7 additional days to file reply briefs to and including

—— Record on Appeal filed

—— Appendix Filed

—— Submitted on Briefs

—— Petition for Writ of Certiorari denied. No opinion.

—— Application for rehearing overruled. No opinion written on rehearing.

—— Permission to file amicus curiae briefs granted.

XX It is ordered that the transcript of the *Hammond* hearing in *Baker, et al. v. Charles Harper, et al.*, "order" issued by Circuit Judge William H. Robertson in *Baker, et al. v. Charles Harper, et al.*, plaintiffs' Acceptance of Remittiture and plaintiffs' Satisfaction of Judgment be considered a part of the record in this appeal.

December 3, 1991
sjm

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk
Supreme Court of Alabama

APPENDIX C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

445 Dexter Avenue
Montgomery, AL 36130

Telephone: 242-4609

Re: 1901350

UNION MORTGAGE COMPANY, INC.,
Appellant

vs.

WILLIE MAE BARLOW, *et al.*,
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

———— Appeal docketed. Future correspondence should refer to the above number.

———— Court Reporter granted additional time to file reporter's transcript to and including

———— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

———— Appell —— granted 7 additional days to file briefs to and including

———— Appellant(s) granted 7 additional days to file reply briefs to and including

———— Record on Appeal filed

———— Appendix Filed

———— Submitted on Briefs

——— Petition for Writ of Certiorari denied. No opinion.

——— Application for rehearing overruled. No opinion written on rehearing.

——— Permission to file amicus curiae briefs granted

XX Upon reconsideration of this Court's order of December 3, 1991, the order is rescinded and the motion to supplement the record with the transcript of *Hammond* hearing in *Baker, et al. v. Charles Harper, et al.*, "order" issued by Circuit Judge William H. Robertson in *Baker, et al. v. Charles Harper, et al.*, plaintiffs' Acceptance of Remittiture and plaintiffs' Satisfaction of Judgment is denied.

January 10, 1992
sjm

/s/ Robert G. Esdale
ROBERT G. ESDALE, Clerk
Supreme Court of Alabama

APPENDIX D

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

445 Dexter Avenue
Montgomery, AL 36130

Telephone: 242-4609

Re: 1901350

UNION MORTGAGE COMPANY, INC.,
Appellant

VS.

WILLIE MAE BARLOW and WILLIE J. GALY,
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

———— Appeal docketed. Future correspondence should refer to the above number.

———— Court Reporter granted additional time to file reporter's transcript to and including

———— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

———— Appell —— granted 7 additional days to file briefs to and including

———— Appellant(s) granted 7 additional days to file reply briefs to and including

———— Record on Appeal filed

———— Appendix Filed

———— Submitted on Briefs

———— Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.

PER CURIAM—Hornsby, C.J., Maddox, Almon, Shores, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

/s/ Robert G. Esdale
ROBERT G. ESDALE, Clerk
Supreme Court of Alabama

3/6/92
bes

APPENDIX E

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, ALABAMA

Case No. CV-89-22

WILLIE MAE BARLOW and WILLIE J. GALY,
Plaintiffs,

vs.

UNION MORTGAGE COMPANY, INC., *et al.*,
Defendants.

[Filed Mar. 4, 1991]

JURY VERDICT: We, the jury, find as follows on plaintiff's Barlow Complaint against the defendant, Union Mortgage:

On Count One of plaintiff's Barlow complaint, we find for the plaintiffs Barlow and against the defendant Union Mortgage, and we assess the following amounts as damages:

Compensatory Damages	$150,000.00
Punitive Damages	$6,000,000.00

It is our intention to assess total damages to the plaintiffs Barlow as to Count One at *$6,150,000.00*

s/ HELEN S. HUNTER
Foreperson

On Count Two of plaintiff's Barlow Complaint, we find for the plaintiff Barlow and against the defendant Union

Mortgage, and we assess the following amounts as damages:

Compensatory Damages	$1,000.00
Punitive Damages	$1,000.00

It is our intention to assess total damages to the plaintiffs Barlow as to Count Two at *$2,000.00*

s/ HELEN S. HUNTER
Foreperson

On Count Three of plaintiffs' Barlow Complaint we find for the plaintiff Barlow and against the defendant Union Mortgage and we assess the following amount as damages:

Compensatory Damages	$1,000.00

s/ HELEN S. HUNTER
Foreperson

We, the jury, find as follows on defendant Union Mortgage's counterclaim against the plaintiffs Barlow:

On Count One of defendant Union Mortgage's counterclaim, we find for the plaintiffs Barlow and against the defendant Union Mortgage.

s/ HELEN S. HUNTER
Foreperson

On Count Two of defendant Union Mortgage's counterclaim, we find for the plaintiffs Barlow and against the defendant Union Mortgage.

s/ HELEN S. HUNTER
Foreperson

Accordingly, Judgment is entered for the plaintiffs and against the defendant on the verdicts for Six Million, One Hundred Fifty-Three Thousand and NO/100 Dollars ($6,153,000.00), costs taxed to the defendant.

Judgment is entered on defendant's counterclaim for the plaintiffs and against the defendant based on the verdict, costs taxed to the defendant.

DONE AND ORDERED this 4th day of March, 1991.

/s/ [Illegible]
Circuit Judge

APPENDIX F

IN THE CIRCUIT COURT FOR
LOWNDES COUNTY, ALABAMA

Civil Action No. CV-89-22

WILLIE MAE BARLOW and WILLIE J. GALY,
Plaintiffs,

vs.

UNION MORTGAGE COMPANY, INC., *et al.*,
Defendants.

ORDER

This cause coming on to be heard before this Court on April 8, 1991, on plaintiffs' Motion for Punitive Damages Hearing based upon the award of punitive damages by the jury in this case on March 1, 1991.

On March 1, 1991, the jury returned a verdict in this case in favor of the plaintiffs and against the defendant, Union Mortgage Company, Inc., a corporation (hereinafter Union Mortgage). Under Count One of plaintiffs' complaint for fraud, the verdict was rendered for compensatory damages in the amount of $150,000.00 and punitive damages in the amount of $6,000,000; under Count Two of plaintiffs' complaint for civil conspiracy the verdict was rendered, for compensatory damages in the amount of $1,000.00 and punitive damages in the amount of $1,000.00; and, under Count Three of plaintiffs' complaint for breach of contract the verdict was rendered for compensatory damages in the amount of $1,000.00. On March 4, 1991, this Court entered a judgment on the verdict in the total amount of $6,153,000.00.

Pursuant to the request of the plaintiffs a hearing was conducted by this Court on April 8, 1991, in accordance with the provisions of Section 6-11-23(b), Code of Alabama, 1975, as amended, and pursuant to the recent decisions rendered by the Alabama Supreme Court in *Hammond vs. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Company vs. Hornsby*, 539 So. 2d 218 (Ala. 1989); and, *Armstrong vs. Rogers Outdoor Sports, Inc.* (Alabama Supreme Court No. 88-1190, March 8, 1991).

During this hearing the Court heard relevant evidence submitted by both the plaintiffs and the defendant regarding the economic impact of the verdict on the defendant, the amount of compensatory damages awarded, the amount of punitive damages awarded, other similar acts of the defendant, efforts of the defendant to make remedial changes to prevent the occurrence of similar acts in the future, the opportunity of the defendant to remedy any wrong as to the plaintiffs, the complicity of the plaintiffs, as well as other relevant evidence.

This Court has taken into account that punitive damages should bear a reasonable relationship to potential harm from the defendant's actions as well as to the actual harm caused by the defendant.

This Court has also considered what degree of reprehensibility should attach to the conduct of the defendant in this case. The factors used by the Court in determining the degree of reprehensibility include the wrongfulness of the conduct, the duration of the conduct, the degree of the defendant's awareness of any actual or potential harm occurring or likely to occur as a result of its conduct, and, any attempted concealment of the harm, along with similar past conduct, if any, and its frequency.

FINDINGS

In rendering its findings, this Court considered the evidence admitted in the trial of this case and the evidence submitted by the parties at the hearing conducted on April 8, 1991.

There is ample evidence to support the verdict for the plaintiffs for compensatory damages under the fraud Count of $150,000.00 due to intentional fraud concerning the plaintiffs' home. Furthermore, there is clear and convincing evidence to support a finding by the jury that the defendant consciously or deliberately engaged in fraud with regard to the plaintiffs. The issue to be determined is whether the punitive damages award of $6,001,000.00 is appropriate and justified by the evidence.

Having considered the evidence presented at the trial of this case and at the hearing conducted by this Court on April 8, 1991, this Court finds that the award of punitive damages in the total amount of $6,001,000.00 is not excessive and is appropriate for the reasons that follow.

The evidence supports the finding that the magnitude and scope of the fraudulent scheme conducted by the defendant is substantial. The defendant engaged in a pattern and practice of intentional fraud affecting citizens throughout the State of Alabama and indeed the continental United States. The object of the defendant's fraudulent scheme is the enrichment of the defendant and its shareholder by means of preying upon the poor and unsophisticated. This object is accomplished by obtaining a mortgage on the victim's home for a consideration substantially less than that stated in the mortgage and disclosure statement. This Court finds that the manner in which the defendant conducts its business presents a continuing risk of harm to the public and serves no legitimate business purpose.

This Court finds that the award of the jury is not excessive considering the economic impact on the defendant. The most recent financial statements for December 31, 1990, of the defendant Union Mortgage has interest income derived from its mortgage portfolio of approximately $30,863,000.00 for 1990. The sole shareholder of the defendant Union Mortgage is Skopbank located in Helsinki, Finland. Skopbank controls Union

Mortgage. Until his death in February, 1991, Union Mortgage's Chief Executive Officer was a Finnish citizen and Skopbank officer sent by Skopbank to manage Union Mortgage. Skopbank continued to pay a portion of Union Mortgage's Chief Executive Officer's salary. The evidence shows that Skopbank continues to control the affairs of its U.S. subsidiaries, including Union Mortgage.

The Court has considered the economic relationship between Skopbank and its wholly-owned subsidiary Union Mortgage. Skopbank has extended to Union Mortgage an unsecured line of credit totalling $550,000,000.00 dollars through a wholly-owned United States holding company. Union Mortgage did not produce any documents which reflect any obligation to repay the money advanced under the "line of credit." Based upon the evidence presented at the hearing of April 9, 1991, this Court finds that a substantial portion of the $550,000,000.00 represents a contribution of capital by Skopbank of Helsinki, Finland, to its wholly-owned subsidiary Union Mortgage. The most recent available consolidated financial statement presented for Skopbank of Helsinki, Finland, for December 31, 1989, reflects that Skopbank realized income from the operation of Union Mortgage of approximately $12,600,000.00 (U.S. dollars).

The jury was justified in awarding sufficient damages to prevent similar wrongs in the future especially in light of the fact that the verdict in this case would have little impact on the defendant unless it is substantial. The Court's understanding of the purpose of awarding punitive damages is to punish the wrongdoer and deter others from similar wrongful conduct in the future. The verdict in this case should be large enough to deter this type of conduct. The verdict will punish the defendant but at the same time the verdict is not so large as to unduly burden the defendant based upon the evidence before this Court. Therefore, the Court finds that the punitive award in the total amount of $6,001,000.00 is not excessive.

The jury awarded compensatory damages in the total amount of $152,000.00. This award is supported in part by the evidence at trial of this case that plaintiff Willie Mae Barlow was made to suffer mental anguish due to the oppressive conduct of the defendant. This Court finds that the punitive award is consistent with the amount of the compensatory damages awarded by the jury.

The evidence supports a finding that defendant has engaged in the same conduct constituting fraud from Union Mortgage's inception in 1982 until the present. Evidence in the hearing of April 8, 1991, established that as recently as April 1, 1991, the defendant has made no effort to change the manner in which it conducts its business. Furthermore, the defendant's president admitted at the hearing of April 8, 1991, that the defendant's business is being conducted in the same manner.

The evidence supports a finding that the defendant had ample opportunity to remedy the wrong committed by it against the plaintiffs and others similarly situated, but the defendant failed to do so. Testimony before the Court during the hearing of April 8, 1991, established that the manner in which the defendant conducts its business will always result in harm to the customer due to the fact that there is no disclosure of the "chop". The wrong committed by the defendant cannot be remedied as long as the defendant continues to do business in the manner in which it is being done even until April 8, 1991.

Accordingly, based upon the findings set forth herein, this Court finds that the punitive damages award is not excessive, and the punitive damages award of the jury in the amount of $6,001,000.00 is sustained.

DONE and ORDERED this 26th day of April, 1991.

/s/ [Illegible]
Circuit Judge

APPENDIX G

COMMERCE AND CONSULAR RIGHTS—FINLAND
FEB. 13, 1934

Treaty and Protocol between the United States of America and Finland of Friendship, Commerce, and Consular Rights. Signed at Washington, February 13, 1934; ratification advised by the Senate, June 15, 1934; ratified by the President, June 28, 1934; ratified by Finland, April 27, 1934; ratifications exchanged at Washington, July 11, 1934; proclaimed, August 10, 1934.

ARTICLE I

Nationals of each High Contracting Party who conform to the laws and regulations of the other Party, shall be permitted to enter, travel and reside in its territory for the purpose of carrying on trade between the two countries; also for other purposes in so far as entry, travel and residence is or may be permitted by local law.

The nationals of each of the High Contracting Parties within the territory of the other shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind, to carry on every form of commercial activity, to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges, upon the same terms as nationals of the state of residence in so far as may be permitted by local law. In no case shall they be accorded less favorable treatment in respect of any of the aforesaid matters than nationals of the most favored nation. They shall be permitted in pursuance of any of the aforesaid activities to appoint representatives, agents, or employees of their choice, subject to the local laws in relation to the imigration of aliens.

The nationals of either High Contracting Party within the territory of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territory of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

* * * *

ARTICLE XVI

Limited liability and other corporations and associations, whether or not for pecuinary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territory thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territory contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territory, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such

party as expressed in its National, State or Provincial laws. If such consent be given on the condition of reciprocity the condition shall be deemed to relate to the provisions of the laws, National, State or Provincial under which the foreign corporation or association desiring to exercise such rights is organized.

ARTICLE XVII

The nationals of either High Contracting Party shall enjoy within the territory of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise, including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein. In the exercise of the foregoing rights and with respect to the regulation or procedure concerning the organization or conduct of such corporations or associations, such nationals shall be subjected to no conditions less favorable than those which have been or may hereafter be imposed upon the nationals of the most favored nation. The rights of any of such corporations or associations as may be organized or controlled or participated in by the nationals of either High Contracting Party within the territory of the other to exercise any of their functions therein, shall be governed by the laws and regulations, National, State or Provincial, which are in force or may hereafter be established within the territory of the Party wherein they propose to engage in business.

The nationals of either High Contracting Party shall, moreover, enjoy within the territory of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the mining of coal, phosphate, oil, oil shale,

gas, and sodium on the public domain of the other. It is understood, however, that neither High Contracting Party shall be required by anything in this paragraph to grant any application for any such right or privilege if at the time such application is presented the granting of all similar applications shall have been suspended or discontinued.

APPENDIX H

No. A-681

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

AFFIDAVIT OF MR. TOM GRÖNBERG, LLM
IN SUPPORT OF PETITIONER'S APPLICATION TO
STAY MANDATE OF SUPREME COURT
OF ALABAMA PENDING CERTIORARI

To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

CITY OF HELSINKI)
) ss.:
REPUBLIC OF FINLAND)

Mr. Tom Grönberg, being duly sworn, deposes and says:

1. I am *Director General for Legal Affairs* of the Foreign Ministry of Finland. I make this affidavit in support of Petitioner Union Mortgage Company Inc.'s ("Union") Application to Stay Mandate of Supreme Court of Alabama Pending Certiorari.

2. Union is a wholly-owned subsidiary of SKOPBANK, a Finnish bank. The majority of the stock of SKOPBANK is owned by the Bank of Finland, a Finnish governmental entity which serves as Finland's central bank. The remaining shareholders of SKOPBANK are Finnish citizens and Finnish savings banks. SKOPBANK is also Union's largest creditor, having extended a credit line for the funding of some of Union's mortgage loans; the current principal balance of this credit line is approximately USD 126,000,000.

3. The Republic of Finland is thus Union's ultimate majority owner and largest creditor. Moreover, the record in this case reflects the fact that Union has a negative net worth. SKOPBANK, having sustained approximately USD 1,000,000,000 in losses in 1991, is itself under the control of the Bank of Finland. Accordingly, the taxpayers of Finland will ultimately fund any punitive damages award Union may be required to pay.

4. The verdict in the instant suit has spawned numerous additional suits against both SKOPBANK and Union in Alabama seeking punitive damages. Resolution of the constitutional issues presented by this case would be likely to be dispositive of many of the issues presented in the other suits pending against SKOPBANK and Union.

5. The events forming the basis of respondents' complaint and of the verdict in their favor occurred in 1988, prior to SKOPBANK's acquisition of Union in January 1989. Nevertheless, the Alabama Supreme Court sustained the jury's award of punitive damages here by reference in significant part to SKOPBANK's alleged financial resources as of December 1989 (which were considerably greater than they are today).

6. The affirmance of the judgment in this case by the Alabama Supreme Court reflects treatment of Union that is inconsistent with that court's treatment of American-owned companies in violation of Union's constitutional

rights and in apparent violation of the Treaty and Protocol between the United States of America and Finland of Friendship, Commerce and Consular Rights of February 13, 1934.

7. Absent a stay, the punishment will fall on the taxpayers of Finland, in that they will be required to fund a payment of over USD 6,800,000 to respondents, which may be difficult, if not impossible, to recover even if this Court ultimately vacates the judgment below.

Wherefore, the Foreign Ministry of Finland respectfully requests that petitioner's application to stay the mandate of the Supreme Court of Alabama pending certiorari be granted.

/s/ [Illegible]

Sworn to before me a
Notary Public, this
13th day of February, 1992.

/s/ _____
Notary Public
[Illegible]
julkinen notaari
notarius publicus

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Maa: / Land: — Suomi / Finland

Taman yleisen asiakirjan: / Denna allmanna handling:

2. on allekirjoittanut / ar undertecknad av — Olli-Pekka Siro
3. toimiessaan / i egenskap av — julkisena notaarina
4. Siina oleva leima/sinetti on / ar forsedd med sigill/stampel av — Helsingin maistraatin

Todistetaan
Intygas

5. Helsingi ssa
6. 13 paivana helmi kuuta 1992.
den
7. Johanna Haavikko vs julkinen notaari
av
8. No. 637
Nr
9. Sinetti/leima:
Sigill/stampel:
10. Allekirjoitus:
Underskrift:

Maksu 25,00 mk

Johanna Haavikko
JOHANNA HAAVIKKO
vs. julkinen notaari
tf notarius publicus

APPENDIX I

[Excerpts from Record Below]

[R-135] MR. TABER:

* * * *

Back during 1987 a bank over in Finland named Skopbank over in Finland, if ya'll don't know that's a country up there where all the time it's cold all the time and has reindeer up on the Baltic Sea, this bank in Finland loaned to Mr. Wheeler $10,000,000.00.

MR. TURNER: Your Honor, we object.

Could we approach.

(Whereupon, an on the record discussion was had in the jury's presence but out of its [R-136] hearing, to-wit:)

MR. TURNER: Your Honor, we object to Mr. Taber's reference to the bank, this company in reference to $10,000,000.00 which is tending to interject into the trial the wealth of this particular defendant.

THE COURT: Objection over-ruled.

(Whereupon, the following proceedings were had and done in the jury's presence and hearing, to-wit:)

MR. TABER: Mr. Wheeler took this money that he borrowed and he bought out Mr. Rubin so that he had it all, had all of Union Mortgage. This happened in 1988 about the time the evidence is going to show that Mrs. Barlow had her business [R-137] dealings with Union Mortgage. In 1989 Mr. Wheeler sold to this bank over there in Finland the company.

I believe the evidence is they got twenty or twenty-three million dollars for it.

MR. TURNER: Judge, again we object.

THE COURT: Objection overruled.

MR. TABER: Then the bank in Finland started operating it. Union Mortgage, here's how Union Mort-

gage operated in the state of Alabama, in Lowndes county and in most of all the states; they operated by putting together a group of people that they called dealers. You are going to hear that word "dealer" all the way through this trial. That's how Mrs. Barlow got involved with them, through one of their dealers.

You are going to hear other witnesses testify about [R-138] how they got involved through one of their dealers and in this instance the dealer that Mrs. Barlow got involved with was a company called American Home Improvements.

The evidence is going to show you the relationship between Union Mortgage and American Home Improvements and all these other dealers. And I believe you are going to hear the testimony that they have got nearly five thousand of them out here all over the United States.

* * * *

[R-141] * * * And in Mrs. Barlow's case the facts are going to show that her mortgage along with the mortgages of Mrs. Rudolph and some other folks here in Lowndes County, these mortgages didn't end up in Dallas. They ended up with a bank in Tokyo, Japan, called the Mitsui bank. And the mortgage on Mrs. Barlow's house here in Lowndes county ended up with the Japanese over there being the people that own it. Not only is the evidence going to show that Union made tremendous profit off the original deal with Mrs. Barlow and Mrs. Rudolph, but the evidence is going to show you that they made another profit when they sold it to the Japanese.

Now, all that sounds awfully sterile, that's sounds [R-142] like you know, so what. So a bank from Finland owns a company in Dallas that makes a loan to Mrs. Barlow and sells it to some Japs, you know, what's wrong?

* * * *

[R-151] Now, how is Union or what is our theory or what is Mrs. Barlow's theory why is Union responsible for this? Why isn't it American or whoever didn't do the

work? Why isn't American the people that are responsible for this?

Well, the answer and the facts are going to show that the reason that Union is responsible not only is it because they devised the plan, it's because all of these dealers, all of these dealers were acting as their agents representing Union in trying to [R-152] put together this paper so they could sell it to the Japs.

Now that's what it boils down to and that's what the evidence is going to show you in essence.

They offered and sold Union credit life insurance. You're going to hear testimony that credit life is a big item. They make a lot of bucks off of it. They tell these dealers such as American that we will pay you three percent to get that borrower to get credit life. That's why they show ten percent discount if you don't buy it, seven percent if they do. In other words, American we are going to give you three percent of that loan if you will sell that credit life insurance for us.

* * * *

[R-824] Q. I know, but don't get mad at me.

A. I'm not mad at all. I don't get mad.

Q. Now, did you have an agreement with Nell Stanberry that you were going to get some money back?

A. Yes, sir.

Q. Tell me about that, if you would, please, ma'am?

A. I was supposed to get—at first I asked for a thousand. She said a thousand wasn't no money.

So I asked for two thousand and it was supposed to be $2,000.00 in money and $6,000.00 worth of work done to my house.

Q. Okay. Is your primary complaint because they didn't do enough work on your house?

A. No, that's not it.

Q. But really you got more than $2,000.00, did you not?

A. What do you say now?

Q. You got more than $2,000.00 in cash, didn't you?

A. I got two thousand.

Q. You got the two thousand then you got the two hundred twenty-seven that Nell Stanberry paid [R-825] on your FHA mortgage?

A. Right.

Q. And then you got two hundred more from Nell Stanberry when you got behind with Union?

A. Right.

Q. So you got $2,427.00 and you said the work in your opinion was only worth $1,500.00?

A. Yes.

Q. So when you only got $1,500.00 worth of work, is your complaint that instead of getting the difference between the money you were given and the $8,000.00 that was the mortgage, the value of the work wasn't enough, is that what you're saying?

A. It wasn't no $6,000.00 worth of work.

Q. That's what I'm saying.

A. It wasn't $2,000.00 worth of work they done to my house.

Q. I don't guess that—what I'm asking is, is your primary complaint to this jury that they didn't do $6,000.00 worth of work?

A. They didn't.

Q. Is that what you're telling the jury, that they didn't do $6,000.00 worth of work, is that why you're here?

[R-826] A. I didn't say why I'm here.

Q. That's what I'm saying.

A. I didn't say that.

Q. That's what I'm asking. If they had done $6,000.00 worth of work would you be here today?

A. I wouldn't say. I wouldn't say.

Q. Well, if they had done $6,000.00 worth of work?

A. Because I don't know what you're saying.

Q. I'm trying to understand what you're telling the jury.

A. Uh-huh.

Q. You're saying that you were supposed to get $2,000.00?

A. Uh-huh.

Q. And you got more than two thousand?

A. Uh-huh.

Q. And you were supposed to get $6,000.00 worth of work?

A. Uh-huh.

Q. So if they had paid you the two thousand and had done $6,000.00 worth of work would you be here today?

A. I don't know.

[R-827] Q. Well, if that had happened, if they had given you the two thousand?

A. I probably would have because all that money I was supposed to pay back $17,000.00 and then I had ten years to pay it. And every time I get late with my payments they're going to call and kick me out on the street, I probably would be here.

Q. He told you that one time?

A. He only told me one time because I sent the money. He called me, he called me every time I got a little late. He called me.

Q. How many payments have you made to Union, do you know?

A. Five or six.

Q. Do you know if you have paid them a total of $520.00?

A. I don't know. I wasn't keeping up with it. I pay them a hundred forty-four dollars and something cents a month.

Q. If their records show you paid them $520.00 would you dispute that?

A. I say I paid them $144.00 a month. How much I done paid them I don't know.

Q. Okay. But you got out of this, according to [R-828] your value on the work, $1,500.00 worth of work, right?

A. Say I got out of it?

Q. You got $1,500.00 worth of work?

A. I don't know what you're saying.

Q. Didn't you say that the work that was done was worth $1,500.00?

A. I say I guess.

Q. I don't do that work either.

A. I say about, about.

Q. I know. That's all I'm going by. I'm not trying to trick you. I'm just trying to ask what you said.

A. I say about fifteen.

Q. You got about $1,500.00 worth of work and you got $2,000.00?

A. Uh-huh.

Q. And you got two hundred and twenty-seven?

A. Uh-huh.

Q. And got $200.00?

A. Uh-huh.

Q. And you paid them five hundred and twenty?

A. Uh-huh.

Q. All I'm getting at is you're still ahead in this, aren't you?

[R-829] A. Not owing them seventeen thousand I'm not.

Q. You don't owe them $17,000.00 now, do you?

A. I don't know what I owe them.

Q. They don't have a mortgage against your house now, do they?

A. I don't know. I don't know.

Q. Okay. Did you hear the testimony when your lawyer asked these gentlemen from American—from Union Mortgage whether or not they still owned the mortgage and they said they had sold it back?

A. I don't know. I don't know who they was talking about. I wasn't understanding who they had sold the mortgage back to because this is something I do not know anything about. That's how I got in here in the first place.

Q. I understand. I want to talk just a little bit about the signing of these papers now. When the—when your lawyer asked you about the deed that was signed from you to you and your son—

A. Yes.

* * * *

[R-1199] MR. TABER:

And then after they gather up from all these dealers those five thousand people out there doing the same thing in all those mortgages and come in here to Union Mortgage. And then they turn around in Willie Mae Barlow's case, they sold that mortgage that they had paid $7,075.00 to the government—to the Japanese for $7,800.00. So not only is the 17.98 percent interest is being paid on $7,075.00. All they got is they pick up another eight hundred when they take it out of their hands.

And it's their argument, it's their argument that that's okay because we are entitled to charge a discount. And a discount is normal in the course of business.

When this case started I couldn't even spell discount much less than understand what it meant.

* * * *

[R-1213] * * * Just send us the paper. Let us chop it. Let us make our ten, thirty percent. Let us sell it to the Japanese and go get some more.

Now, that's their operation. That's their operation.

What they did to Willie Mae is in dollars small. The way they operate their business is a travesty.

The way they operate their business is a design, plan, to circumvent the laws regulating lenders so that they can take advantage of the uneducated and the unsophisticated.

* * * *

[R-1291] Mr. Turner, Mr. Robert Turner in his closing argument quoted you from the highest authority. He told you the story that when the woman was brought before our Savior, he said let's let who is without sin cast the first stone and everybody left.

There's never been but one person in all the world that was without sin and they crucified him.

But before they crucified him he threw the moneychangers out of the temple. The only act of violence that our Savior performed during his life, recorded lifetime. He threw the moneychangers out of the temple.

MR. REESE: Amen. Amen.

MR. TABER: They say we weren't dealing with Miss Barlow. It was Miss Stanberry who's not Japanese or Finnish.

It was Ida Sellers who's not [R-1292] Japanese or Finnish.

It was Walter Sellers down here at the school trying to conspire with Miss Barlow and cheat Union.

What did Union Mortgage say in that telephone call to Miss Barlow? They say, we will place a mortgage on your home. Don't say Ida Sellers is going to put a mortgage on your home. Doesn't say American Home is going to put a mortgage on your home. Doesn't say Ronald Sellers is going to put a mortgage on your home. This is Union. We are going to put a mortgage on your home.

* * * *

[R-1294] * * * Lucinda didn't call her. Union called her. Said get to that school and get this thing straightened out. We have got a tape where she says it wasn't all for home improvement. We have got to have a tape that says it was all for home improvement so we can sell it to the Japanese. We have got to have these things. So get down there and straighten that lady up and straightened her up now. She didn't stop for woods, water or cold. She got in the car and she came down the highway and she went to Central School and she went there and she got heard. She's on the phone when Lucinda comes to school. She comes to the door. She says, "Union wants to talk to you." And [R-1295] she hands Lucinda the phone. And Lucinda says what Miss Stanberry tells her to say and then they get another tape. So now they have got it where they can sell it to the Japanese. And I be-

lieve you can infer that Union gave Miss Stanberry unmitigated, probably worse than Mr. Borschow said to Mr. Cannon. She got there. She understood from there on.

When we call Willie Mae Barlow or we call Elisha or we call Ora Bell Hester, when we call Lucie Shuford, don't you let that happen again. We can't have any more say that. We have got to have them saying what they have got to say so we can sell it, sell it to the Japanese. That's what the tapes are for. That's what the tapes are for.

* * * *

[R-1309] * * * That's the count where Miss Barlow is claiming damages because she didn't get the work that she contracted for on her house. And there are no punitive damages on that line. This is just compensatory. You say compensatory damages and the Judge is going to instruct you as to what constitutes compensatory damages. And part of that is going to be any mental pain and suffering she might have had. And when you start talking about putting dollars on her mental pain and anguish remember the remark, "We are going to put your butt in the street." And what would have that done to her mentally? You take these telephone calls and they're going to sell the mortgage to the Japanese. I haven't seen any tapes of calls when they are going to throw people out of the houses. I don't know where those tapes are.

* * * *

[R-1342] THE COURT:

* * * *

If the Plaintiffs, by reason of their willful, affirmative misrepresentations are in pari delicto with American Home Improvement, even if the Defendant, Union Mortgage Company, were otherwise civilly liable, the claim of the Plaintiffs is barred.

If you find these to be the facts in this case your verdict must be in favor of the Defendant, Union Mortgage Company.

Now, ladies and gentlemen, I charge you that it is not illegal, wrongful or improper for Union [R-1343] Mortgage to charge a discount when buying its paper. Likewise there is no legal or contractual duty that requires that Union Mortgage disclose to the Plaintiff that it purchased the Plaintiff's mortgage at a discount.

* * * *

[R-1532] Q. All right. Now what has happened to that money since it was paid in?

A. It's in the capital account.

Q. Has any of that money been lost? Has the capital account gone down?

A. Not the paid in capital account. The total stockholders' equity has.

Q. What is the stockholders' equity gone down to?

A. Three million five hundred thousand.

Q. So since that money was paid in they lost a million and a half of it, is that what that means?

A. Uh-huh.

Q. What is the stockholders' equity in Union Mortgage Company according to the last financial statement that you show?

A. Three million five hundred thousand.

* * * *

[R-1835] Question: "All right, sir. I will ask you if you are familiar with the financial record of Union Mortgage Company and if so how?"

Answer: "I'm familiar with the audited financial statements of the company, as our firm has performed the audit on the company for the last two years."

Question: "All right, sir. Has your firm prepared the audited financial statements for Union Mortgage Company for the past two years?"

Answer: "No, sir. We don't prepare them. We only audit."

Question: "Wrong phrase, I'm sorry.

Answer: "Audit. The company prepared the financial statements."

Question: "And it's audited by Ernst and Young?"

Answer: "Correct."

Question: "All right, sir. I will show you, if you would examine, please, sir, defendant's exhibit two which purports to be a financial statement [R-1836] of Union Mortgage Company dated December 31 of 1990 and if you would, please, examine the next page of that page two."

Question: "Pursuant to my request have you examined this financial statement?"

Answer: "These are the financial statements that have been examined as of December 31, 1990."

Question: "And in preparation for your deposition have you also looked at them again?"

Answer: "Correct."

Question: "All right, sir. According to this financial statement as shown on defendant's exhibit two, what is the current net worth of Union Mortgage Company?"

Answer: "$3,518,000.00."

Question: "All right, sir. How do you arrive at the net worth of the company, such as Union Mortgage Company?"

Answer: "It's basically the difference [R-1837] between the total assets of the company less the total liabilities."

* * * *

APPENDIX J

IN THE CIRCUIT COURT OF
LOWNDES COUNTY, ALABAMA

Civil Action No. CV89-22

WILLIE MAE BARLOW and WILLIE J. GALY,
Plaintiffs,

v.

UNION MORTGAGE COMPANY, INC., *et al.*,
Defendants.

MEMORANDUM BRIEF OF DEFENDANT

This Brief is submitted by the Defendant Union Mortgage Company, Inc., (Union) in connection with the hearing held pursuant to Ala. Code § 6-11-23 (1975) respecting the award of punitive damages granted by the jury in this action.

* * * *

IV. THE PUNITIVE DAMAGES AWARD ASSESSED AGAINST UNION VIOLATES DUE PROCESS

A. The Punitive Damage Award In This Case Transcends The Bounds Of Fundamental Fairness

In *Pacific Mutual Life Ins. Co. v. Haslip*, 59 U.S.L.W. 4157 (U.S. Mar. 4, 1991), the United States Supreme Court held that the application of Alabama's criteria for determining and reviewing punitive damage awards did not violate the due process rights of a defendant who had been assessed punitive damages which were only approximately four times the amount of the plaintiff's compensa-

tory damages and approximately 200 times her out-of-pocket expenses. In reaching this decision, the Supreme Court was careful to limit its task to that of determining whether "the Due Process Clause renders the punitive damages award *in this case* constitutionally unacceptable" and to point out that in some future case "unlimited jury discretion . . . may invite extreme results that jar one's constitutional sensibilities." *Id.* at 4161.

While the Supreme Court recognized that it was not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," it is clear that wherever that line may be, the jury passed it in this case. *Id.* Here, the award of punitive damages was not four times, but almost 40 times greater than the award of compensatory damages, which itself bore no rational relationship to the harm suffered by the plaintiffs. Even more astonishing, this is a case in which plaintiffs not only suffered no actual monetary loss, but instead realized a net gain of approximately $3150 in cash and home improvements (by their own calculation). Yet, the amount of punitive damages awarded was six million dollars, or six times the amount awarded in *Pacific Mutual.* This award is likely to bankrupt the defendant for having engaged in conduct which this Court and a federal district court have stated is neither wrongful nor deceitful. If any case steps over the line between constitutionally acceptable and constitutionally unacceptable punitive damages awards, it is this one.

B. Union's Exposure To Successive Punitive Damage Awards In Subsequent Cases Violates Its Due Process Rights

Even if the award of punitive damages in this case does not by itself violate due process, unless the conduct being punished is carefully delineated, this award exposes Union to a crippling series of successive punitive damage

awards. As stated previously, there are some twenty cases currently pending against Union and numerous others which may be brought in the future, all based on the same kind of transaction at issue in this case. If the juries in these cases choose to assess punitive damages against Union because this Court failed to make clear that it was meting out full punishment for the whole pattern of Union's allegedly wrongful conduct, Union will have been deprived of its due process rights. *See, e.g., In re School Asbestos Litigation* 789 F.2d 996, 1005 (3rd Cir.) ("powerful arguments have been made that, as a matter of constitutional law or substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same act or series of acts"), *cert. denied*, 479 U.S. 852 (1986); *Leonen v. Johns-Mansville Corp.*, 717 F. Supp. 272, 285 (D.N.J. 1989) ("the court agrees that fundamental fairness demands that some safeguards be present to protect defendants in mass tort litigations from the imposition of runaway and disproportionate punitive damages awards") *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("In theory . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.").

The magnitude of the constitutional problem confronting Union is illustrated in the opinion of the New Jersey District Court in *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989). In that case, the court concluded that "there has been or may be a violation of defendants' due process rights through repetitive awards of punitive damages" in connection with asbestos-related injuries. *Id.* at 1236. Nevertheless, the court felt that it was unable to fashion a meaningful remedy largely be-

cause it could not determine whether or not the first award was "intended by the jury to constitute 'full' punishment of the defendant's wrongful conduct." *Id.* at 1235.

Union faces the same problem as the defendants in *Juzwin* since a future court may be equally unable to ascertain whether the punitive damages award assessed against it was intended as full punishment. Accordingly, in order to ensure that Union's due process rights are properly protected, this Court should, in the event it chooses to sustain an award of punitive damages, clearly state that the award is in full punishment for the pattern and practice alleged of Union.

CONCLUSION

For all of the foregoing reasons, this Court should overturn the award of punitive damages assessed by the jury against Union in this case.

This the 22nd day of April, 1991.

Turner and Turner, P.C.
P.O. Box Drawer 030148
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By: /s/ Albert G. Lewis, III
ALBERT G. LEWIS, III
Attorney for Union
Mortgage Company. Inc.,
Defendant

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading upon opposing counsel for all parties to this proceeding by depositing a copy of same in the United States Mail, postage prepaid and properly addressed.

This the 22d day of April, 1991.

/s/ Albert G. Lewis, III
Of Counsel

APPENDIX K

IN THE CIRCUIT COURT
FOR BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Case No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiffs,

vs.

CHARLES HARPER, *et al.*,
Defendants.

ORDER AND JUDGMENT

[Filed July 24, 1991]

This day in open court came the parties with their attorneys, and this cause coming on to be heard and issue having been joined between the Plaintiffs and Defendant, and this cause having been regularly set for trial the 22nd day of July, 1991, thereupon, in open court on this day, in the presence of both the parties with their attorneys, came a jury of good and lawful persons, to-wit: Charles Beasley and eleven others, who, having been first duly impaneled and sworn, according to law, and who having heard the evidence and the charge of the court, upon their oaths, in open court on this day in the presence of the Plaintiffs, Defendant, and their attorneys, to say:

"We the jury find in favor of the Plainitff Lucille Baker and against Union Mortgage Company and assess damages as follows:

$1,000,000.00 ..... compensatory damages
$8,000,000.00 ..... punitive damages

"We the jury find in favor of the Plaintiff Roral Hall and against Union Mortgage Company and assess damages as follows:

$1,000,000.00 ..... compensatory damages
$8,000,000.00 ..... punitive damages

"We the jury find in favor of the Plaintiffs Mattie and Robert Person and against Union Mortgage Company and assess damages as follows:

$1,000,000.00 ..... compensatory damages
$8,000,000.00 ..... punitive damages

"We the jury find in favor of the Plaintiffs Johnny and Nina Tatum and against Union Mortgage Company and assess damages as follows:

$1,000,000.00 ..... compensatory damages
$8,000,000.00 ..... punitive damages

"We the jury find in favor of the Plaintiffs Joe and Patricia Lampley and against Union Mortgage Company and assess damages as follows:

$1,000,000.00 ..... compensatory damages
$8,000,000.00 ..... punitive damages

It is therefore

ORDERED AND ADJUDGED by the Court that judgment be and it is hereby entered in favor of Plaintiffs and against the Defendant as found by the jury in this cause, and all costs in this cause be taxed against the Defendant for the recovery of which let execution issue.

ENTERED this the 24th day of July, 1991.

/s/ [Illegible]
Circuit Court Judge

APPENDIX L

[Excerpts from Post-Trial Transcript
in *Baker v. Harper*]

[770] RALPH C. BLACK

the witness herein, after first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROCK:

Q Would you give us your full name, please, sir.
A Ralph C. Black.
Q Wnat is your age, Mr. Black?
A 47.
Q Are you married?
A Yes, I am.
Q What is your current residence address?
A Box 67, Country Ridge, Melissa, Texas.
Q Is that in the Dallas, Texas, area?
A Yes, it is.
Q How are you currently employed?
A I'm employed by Union Mortgage Company as the president.
Q And how long have you been employed by Union Mortgage?
A I have been with Union Mortgage since April of 1982.
Q Where were you born?
A I was born in Canon Falls, actually Red Wing, Minnesota.

* * * *

[796] Q Okay. And what is your estimate as to what the operating loss will be for the year for Union Mortgage?
A The total of the year I think will be in the neighborhood of a $20 million loss.
Q And what is that opinion based on?
A It is based on the settlements that we have made in some of the Alabama cases, it is based on the losses that

we have taken on the Alabama cases, losses in the normal course of doing business, losses because of the paper previously purchased by us back in 1989, some of that "D" paper. That "D" paper has turned into losses. Losses on REOs that we made, that, quite frankly, we should never have put them into a REO status; in other words, foreclosed on the property there was negative activity. We had to pay off first mortgages, and in several cases we couldn't sell the property for what we had paid off on the first mortgage much less recover the money we had spent on attorneys fees and on purchasing the account to start with.

* * * *

[804] MR. BROCK: We offer 44.

THE COURT: Okay. Let's just keep one copy of all that. Do y'all want to look at those? Put the original—

MR. BEASLEY: This is one.

THE COURT: That is the original for the court?

MR. BROCK: Yes, sir.

Q After satisfying its monthly business expenses and interest payments, does Union Mortgage have funds available to fund the payment of a monetary award?

A No.

Q What is the current business situation with respect to Union Mortgage?

A Not very good. As of about the first part of September Union Mortgage ceased buying home improvement contracts, all other contracts. All of our 29 branch offices are closed. We went from 267 employees to presently today we have 113 employees. We will lay off more employees in the next, probably, week to two weeks. We have renegotiated all our leases. We have been fortunate in that we have been able to have somebody sublet some of the property we have. We are in what would be considered a shutdown mode of Union Mortgage.

Q Is Exhibit 59 a memorandum of October 22, 1991, [805] summarizing the shutdown cost of Union Mortgage?

A Yes, it is.

Q Is that to date?

A Yes, sir.

Q How many employees have lost their jobs to date with Union Mortgage since the verdict in the Baker case?

A 140 some employees, roughly.

Q And how many employees are left?

A 113 right now.

Q And you say they more will lose their jobs in the next couple of weeks?

A That's correct.

Q And do you have an estimate as to how many will lose their jobs in the next couple of weeks?

A Probably another 30.

Q Was the decision not to accept any new business a decision that was made by the Board of Directors of Union Mortgage?

A Yes, it was.

Q What was the reason for that decision?

A The reason for it was mainly the verdict of—that was rendered in July against Union Mortgage for the $45 million. We could not continue to operate and face those sort of lawsuits; more specially, when you have people who have told us work is completed, it is not done, [806] and they are the beneficiaries of that kind of award.

Q Has the publicity that has been attendant with the result in the case been harmful to Union Mortgage business?

A I think that is another reason we shut down. You cannot continue to operate and do business, and have the confidence of people that you do business with, when you have your name in every paper in the State of Alabama, TV stations, radio stations, and it is also picked up by *Business Weekly Magazine*, and *Wall Street Journal*, and various others newspapers, in Dallas also.

Q Is it correct that Union Mortgage is not currently accepting any new business?

A We are not accepting any new business.

Q Is it also correct that it would be impossible for the citizen in the State of Alabama to be harmed at the present time by Union Mortgage in the way that the plaintiffs in the Baker case say they have been harmed?

A If we were still in business it would be impossible, but since we are not in business it is also still impossible,

Q Well, you say if you were still in business it would be impossible. Why do you say that?

A Because of the checks and balances that we feel we have in our system, or I should say in the manner, we [807] don't have them on the street any more because there is no system any more.

MR. BROCK: We offer 59.

THE COURT: It will be admitted.

Q Is Exhibit 19 the memo that you sent to all employees on August 22, 1991, instructing all employees that the Board of Directors of Union Mortgage have decided to personally cease all production including the purchase of retail installment contracts?

A Yes, it is.

Q And that would have been as of August 22, 1991?

A Correct.

MR. BROCK: We offer 19.

THE COURT: It will be admitted.

Q And that was a permanent closing of Union Mortgage business?

A That's correct.

Q Was that done in a temporary fashion prior to that on July 30, 1991, as reflected on Exhibit 17?

A Yes. It started when we discontinued giving out commitment.

Q And what was the reason that you stopped giving commitment? As a result of the verdict in the Baker case?

A That's correct.

MR. BROCK: We offer 17.

* * * *

[864] DIRECT EXAMINATION

BY MR. BROCK:

Q Would you state your full name for the record, please.

A Henrik Skrabb.

Q And is it correct that you reside in Helsinki, Finland?

A Yes, actually in a small county outside Helsinki. It is a small independent town called Kauninen.

Q What is your native language?

A Well, Finland is a bilingual country. I have both Finnish and Swedish as my mother tongue.

Q What other languages do you speak?

A Bad English, and German. That is about what I consider I speak.

Q Are there other languages that you understand?

A Well, I have been learning eight years Latin in school; so, obviously, I can understand more or less written Spanish, French, Italian, Danish, Norwegian, that is about it.

Q The reason I ask those questions is that I do, in all seriousness, want you to be clear that if we ask a question that you don't understand, please ask us to rephrase the question if you would. That goes for me or the judge or the parties or anyone else.

[865] A All right. The same, if I use a word you can't understand, that might be the wrong word. So, bear with me.

Q All right. What is your educational background, please, sir?

A I have a Master's Degree of Political and Economic Sciences from the Helsinki University.

Q And in what year was that degree obtained?

A 1968.

Q Is it correct that your present employer is the Skopbank of Finland?

A Yes.

Q What is your job position with the Skopbank?

A I'm a senior vice-president of Skopbank.

Q Please describe your job responsibilities and duties with Skopbank.

A I act as the —what you could say an international coordinator of our units and outlets abroad. I sit on the board of all our companies abroad, and then I also supervise correspondent banking back in Finland.

Q What is correspondent banking?

A That is our contact to banks abroad with which we cooperate.

* * * *

[872] Q It is correct, is it not, that there has been a recent change in the ownership of Skopbank?

A Yes.

Q Please describe that change for the benefit of the court.

A Well, like in other European countries, especially the Nordic countries, the foreign exchange, and other regulations concerning banking, have been liberalized very much, so during the 80s, especially since the middle of the 80s, banks, including Skopbank, also emerged into different kinds of activities that were formerly prohibited by the regulations, especially foreign business. And, that meant that we went into different kinds of commitments that we now are suffering from, that is mainly due to the economic situation in Finland. We have had this slump for some time now, and are really in a recession. These stock exchanges is really down, it is more or less dead. And, so [873] that was some of the reasons why we got into trouble. And the other one was that we, according to the Bank of Finland who took us over, had irresponsible management or bad management; so, in order to, and this is my personal view of it, because I can't speak on behalf of the Bank of Finland by my personal views, is that the Bank of Finland wanted to give a clear sign to the outside world that Finland, being a very small country, have lenders as a last resort in Finland, and the

Bank of Finland would not let any Finnish bank get into that kind of trouble that would endanger the monies of the depositors or outside creditors.

Q Did the Skopbank become the owner—

MR. BROCK: Excuse me, strike that.

Q Did the Bank of Finland become the owner of Skopbank?

A Yeah. There was a special issue of shares to the Bank of Finland, according to which they have a majority of our shares at the moment and about two-thirds of the voting rights in Helsinki.

Q You mentioned that the Skopbank held investments that was causing financial difficulties. What kind of investment are you talking about?

A Well, mainly, I would say that was the new business areas that we merged into in the eighties that we were buying up, as we then thought in good Finnish and [874] foreign countries. The slump in the stock trading was quiet, and especially in Finland; the words of that portfolio is now considerably much lower than the cost at which we had acquired that. So, that portfolio was frozen down and we think that it doesn't—the market value doesn't correspond to the substance of those companies; so, therefore, we didn't want to get rid of them.

Q Does the Central Bank of Finland now control the operation of the Skopbank.

A Yes.

Q Who does the Central Bank of Finland report to?

A They report—well, you can say that they report to the Parliament of Finland, and the Parliament—there is a banking committee that acts in a way like a supervisory board of the Bank of England.

Q Now, is it correct that the Central Bank of Finland is an arm or an agency of the Finnish Parliament?

A Yes.

Q And is part of the Finnish Parliament?

A Well, it is not part, but it is certainly an arm of it.

Q What has been your personal involvement in the

direction and establishment of policy with the Union Mortgage Company of Dallas, Texas?

A Well, as I said, I am at the moment a [875] coordinator for our firm subsidiary of that. I was not personally involved when we acquired Union Mortgage. I have been involved in Union Mortgage since my previous boss, Mr. Sukselainen, resigned, and at that time we established something that we called National Business Committee in Skopbank, and my new boss Mr. Sakari Virolainen wanted somebody to coordinate these activities. So, as I said, I have been sitting on the board since then.

We considered Union Mortgage to be an investment. And as we took it over, we found it very important that Union Mortgage continue with the activities that they had been doing. And to tell you the truth, we blue-eyed Fins coming to the United States did not really know the business very well.

Q How did you plan to undertake to gain an understanding of the business?

A Well, we sent some people to Union Mortgage, and later on we sent Virolainen who was named the ECO of Union Mortgage.

* * * *

[879] Q (Mr. Brock continuing) Mr. Skrabb, what is the operating profit for loss of Skopbank for the year 1991 through the most recent financial statements of Skopbank?

A Well, for the eight first years, it is—I don't remember exactly, but between four hundred and five hundred million Finnish Marks.

Q For the eight months—the first eight months of 1991 you have suffered a four hundred to five hundred million Finnish Mark loss?

A That's correct.

Q In terms of your operations?

A That's correct.

Q And, what is the current exchange rate as relates to the U.S. Dollar and Finnish Mark?

A It is around four marks to the dollar—a little more than four marks to the dollar.

Q So, your operating results year to date would reflect a loss of approximately $100 million dollars?

A Yeah, a little more than that.

Q Okay. What is your opinion as to what the operating loss will be for the Skopbank for the year 1991?

A Well, we are a publicly quoted company, so this is insider information, so I can only say my personal view. Considering the circumstances, I think that our loss for [880] this year is calculated more in billions than in millions.

Q So, we are looking at something that will be at least a $250 million dollar loss?

A U.S. Dollars?

Q Yes.

A That is my personal opinion, yes. That is the minimum.

Q Is it correct that it would not be possible for Skopbank to pay a money judgment if ordered to do so by an arbitration panel out of its current operating income?

A No, we couldn't do that.

Q Are you aware of the fact that Skopbank has entered into an indemnification agreement whereby it has agreed to indemnify the verdict in this case?

A Yes, I am.

Q In order to get approval to pay a judgment such as that, if the money were available, what steps would have to be taken?

A Well, in the present circumstances, and that is, of course, the exception in Finnish banking, I think although we had the bill according to prudent banking principles that we tried to adhere to—to pay this kind of large amount, I don't think that it is in our decision. That would go, certainly, to the Bank of Finland, and if I think what they—how they might decide upon that, I think [881] that is also such a big amount that in case that was to be paid I think they would have to refer that

to the Parliament, because that would be out of taxpayers' money, and, Finland has, and has always, looked after its obligations in an exemplary manner; but, anyhow, I think that would be a very big question that would have to be discussed both on party and on—on diplomatic levels.

Q Are you aware of the fact that a line of credit was extended to Union Mortgage initially by Skopbank, and then through USF Texas?

A Yes, I am.

Q What was the purpose of the line of credit?

A That was funding the operations and the loans that Union Mortgage was granting to their clients.

Q Is that line of credit currently available to Union Mortgage?

A Well, in practice no, because we have discontinued operations, and there are no new loans going out.

Q Has Union Mortgage made interest payments for Skopbank on that loan?

A Yes.

Q And do they regularly make interest payments on that loan?

A Yes, of course.

[882] Q Is the money that was advanced under that line of credit, in fact, a loan?

A Yes, of course.

Q And does Skopbank expect that Union Mortgage will repay the principal on that loan?

A Yes, of course.

Q Has Union Mortgage been a profitable investment to Skopbank?

A Well, considering the circumstances, no.

Q Does Skopbank control the day-to-day activity of Union?

A No. Not the day-to-day activities, no. That is the purpose of the management of the company.

Q What is the relationship between Skopbank and Union Mortgage?

A It is an investment from our point of view, and we expect the investment to give us a good return.

Q And would it be your testimony that it has not given you a good return?

A Not so far.

* * * *

[895] THE COURT: What is the next witness going to testify about?

MR. BROCK: Ted Martens is going to testify about the financial condition of Union.

THE COURT: Is he going to add anything to what has already been said? I mean it is broke.

MR. HENIG: You don't mind if Mr. Skrabb sits in? He is not going to be recalled or anything.

MR. WILSON: We don't object.

MR. BROCK: Give me just a minute.

THE COURT: See what he is going to say.

MR. BROCK: We need to do this. I'll do it quickly.

THEODORE MARTENS

the witness herein, after first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROCK:

Q Would you give me your full name, please, sir.

A Theodore F. Martens.

Q What is your business or occupation, please, sir?

[896] A I'm a partner with the accounting firm of Coopers & Lebrande.

Q What is your educational background?

MR. WILSON: We will stipulate to his qualifications if he is a partner in Coopers & Lebrande.

THE COURT: The court will accept him as an expert on any opinion testimony he wants to give.

WITNESS: There is a question on my education?

MR. BROCK: No.

WITNESS: Okay.

Q Would you give the Court the benefit of the documents that you have reviewed in this case with respect to loans that were made to Union Mortgage through a line of credit.

A I have reviewed the master promissory note that was I believe in 1990, the facility letter from 1989. I have also reviewed the schedules that have been prepared by the company for purposes of tabulating or computing the interest charges on a month-to-month basis.

* * * *

[902] Q What is the current negative net worth of Union Mortgage?

A If I could see the September 30, 1991, Trial Balance. As of September 30, 1991, Union Mortgage has a net worth—a negative net worth of approximately $4 million.

Q These adjustments that you referred to earlier, will they affect the net worth of the company?

A The adjustments that I referred to earlier would have the effect of increasing the negative net worth, and if we are thinking in terms of it, as we speak, $4 million, that will take the negative net worth from negative $4 million to approximately a negative $8 million.

Q Has Union Mortgage been a profitable business in the last three years?

A No.

Q Have you examined the financial records of Skopbank?

A Certain financial records, yes I have.

* * * *

APPENDIX M

IN THE SUPREME COURT OF ALABAMA

Supreme Court Number 1901350

UNION MORTGAGE COMPANY, INC.,
Appellant,

vs.

WILLIE MAE BARLOW and WILLIE J. GALY,
Appellee,

MOTION TO SUPPLEMENT RECORD

Comes now Appellant, Union Mortgage Company, Inc., and respectfully moves this Court to supplement the record before it on this appeal with the following matter:

(1) Transcript of *Hammond* hearing in *Baker, et al. v. Charles Harper, et al.*, No. CV-90-048, slip op (Cir. Ct. Barbour County, Clayton Division) held on October 25, 1991.

(2) "Order" issued by Circuit Judge William H. Robertson, in *Baker, et al. v. Charles Harper, et al.*, No. CV-90-048, slip op (Cir. Ct. Barbour County, Clayton Division) on November 13, 1991.

(3) Plaintiffs' Acceptance of Remittitur of verdict in *Baker, et al. v. Charles Harper, et al.*, No. CV-90-048, slip op (Cir. Ct. Barbour County, Clayton Division) on November 13, 1991.

(4) Plaintiffs' Satisfaction of Judgment in *Baker, et al. v. Charles Harper, et al.*, No. CV-90-048, slip op (Cir. Ct. Barbour County, Clayton Division) on November 13, 1991.

As grounds for this Motion, Union states that this new matter describes subsequent developments since the trial and *Hammond* hearing in this case, which render any punitive damages award against Union constitutionally impermissible by reference to the Alabama and United States constitutions, or, in the alternative, require the remittitur of the punitive damages award in this case to an amount commensurate with these subsequent developments.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon John Taber, Esquire, P.O. Box 4807, Montgomery, AL 36103, by placing same in the United States Mail, postage prepaid and properly addressed on this the 19 day of November, 1991.

/s/ Robert C. Beach
Of Counsel

APPENDIX N

IN THE SUPREME COURT OF ALABAMA

Supreme Court Number 1901350

UNION MORTGAGE COMPANY, INC.,
Appellant.

vs

WILLIE MAE BARLOW and WILLIE J. GALY,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF LOWNDES COUNTY, ALABAMA

BRIEF OF APPELLANT UNION MORTGAGE COMPANY, INC.

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APPENDIX O

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

vs.

CHARLES HARPER, *et al.*,
Defendants.

ORDER

[Filed Nov. 14, 1991]

This matter has come before the Court on Defendant Union Mortgage Company, Inc.'s Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for a New Trial, or, in the Alternative, Motion for Remittitur, and the court has heard arguments of counsel and testimony for Defendant and for Plaintiffs. The Court held a hearing on Union's motions on October 2, 1991, and the Court conducted a hearing on October 25, 1991, pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

For the reasons set forth below, the Court is of the opinion that Union's motions are due to be denied, but that the denial of the Motion for a New Trial should be conditioned upon Plaintiffs' acceptance of a remittitur of the jury verdicts in the amount of $40.5 million. This will result in a total award of $4.5 million to be allocated among the Plaintiffs as set forth below:

Plaintiff Family	Compensatory Damages	Punitive Damages	Total Award
Joe & Patricia Lampley	$800,000	$100,000	$900,000
Johnny & Nina Tatum	$800,000	$100,000	$900,000
Robert & Mattie Person	$800,000	$100,000	$900,000
Lucille Baker	$800,000	$100,000	$900,000
Roral Hall	$800,000	$100,000	$900,000

Findings

Defendant Union contends that the jury verdicts were excessive as to the compensatory and punitive damages awards. The Court will consider each in turn.

(1) *Compensatory Damages.*

The jury awarded $1 million to each Plaintiff family. Each Plaintiff family in this case entered into separate and distinct transactions with Defendant Charles Harper and Lawrence Construction Company (collectively referred hereinafter to as "Harper"). A compensatory award to each Plaintiff was warranted under the evidence. Each Plaintiff suffered physical injury and severe emotional distress as a direct result of the conduct of Harper. The amount of compensatory damages suffered was significant. There was, however, insufficient evidence to demonstrate that Union could have foreseen this injury and distress.

The jury award in this case was somewhat excessive for the type of injuries suffered by Plaintiffs. Therefore, the compensatory award is reduced to the following amounts:

(1) Joe & Patricia Lampley — $800,000

(2) Johnny & Nina Tatum — $800,000

(3) Robert & Mattie Person — $800,000

(4) Lucille Baker — $800,000

(5) Roral Hall — $800,000

(2) *Punitive Damages.*

This Court finds that an award in excess of the statutory cap was warranted. Alabama Code § 6-11-21.

This Court finds that an award of punitive damages against Union was appropriate in this case in the light of the reprehensible conduct of Harper in inducing Plaintiffs to enter into home improvement contracts. Specifically, this Court finds that Harper, and other companies in Alabama and in the rest of the United States, on separate occasions, entered into home improvement mortgages with customers who had limited financial resources and little education. Union purchased mortgages from Harper, and other companies in Alabama and the rest of the United States, under terms that included a discount, high interest rates, a mortgage on the customer's home, and in the absence of an appropriate opportunity for the customer to rescind the home improvement loan. The Court finds that the evidence was sufficient to support the conclusion that Harper was the legal agent of Union.

Although Union did not itself engage in intentional wrongful conduct, Union failed to exercise due care in dealing with companies, such as Harper, and recognized substantial benefits from the purchase of these mortgages, which were procured by the wrongful conduct of Harper. The Court finds that this lack of care was national in scope.

However, this Court also finds that, in the light of the facts set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and in the light of the due process clause of the Alabama and United States Constitutions, an award totaling $40 million is excessive to accomplish the goals of punitive damages, which are punishment and deterrence.

(a) *Propriety of Punitive Damages and Exceeding the Statutory Cap.*

In this case, there was insufficient evidence to support a finding that Union in any way knew of, participated in, authorized, ratified or foresaw the actions by Harper, which had the effect of causing physical injury and emotional distress to Plaintiffs.

However, this Court finds that there was sufficient evidence for the jury to find that Union did, in fact, benefit from its practices of purchasing mortgages from home repair companies throughout the United States. Further, this Court finds that Union's actions constitute a pattern and practice. This pattern and practice comprises separate and distinct transactions involving each of the Plaintiffs, as well as consumers throughout the United States, each transaction arising out of Union's course of conduct in its dealings with home repair companies. Therefore, punitive damages against Union are appropriate and the cap on punitive damages awards should not apply. Alabama Code § 6-11-21; § 6-11-27. The punitive damages assessed in this case are intended to punish Union for the entire pattern and practice of conduct throughout Alabama as well as the rest of the United States.

(b) *Remittitur.*

In considering Union's Motion to Remit the punitive damages award, this Court is required to apply the standards prescribed by the Supreme Court of Alabama in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Company v. Hornsby*, 539 So.2d 218 (Ala. 1980), and the due process clause of the Alabama and United States Constitutions. This Court finds that in light of those standards, the punitive damages award of $40 million is excessive to punish Union for its

pattern and practice of conduct throughout the United States and remits this award to the amount of $500,000.[1]

In deciding to remit this award the Court applied all the *Hammond* factors, but found the following to be the most significant:

i. *The Harm Which is Likely to Occur in the Future.*

The Court finds that, in response to jury verdict rendered against Union in *Barlow v. Union Mortgage Company, Inc.*, No. CV-89-22 (Lowndes County) and in the instant action, Union instituted aggressive and appropriate business practices to ensure that consumers would no longer be taken advantage of by unscrupulous companies. Furthermore, Union has recently ceased purchasing home improvement contracts from all companies. Accordingly, this Court finds that there is no risk that any person will be harmed in the future from the pattern and practice of conduct at issue in this case.

ii. *Financial Condition of Defendant Union.*

This Court has considered the financial condition of Defendant Union, and finds that a punitive damages award of $40 million is excessive to accomplish the remedial purposes of punishment and deterrence.

Plaintiffs argue that this Court should take into account the financial condition of Union's parent, Skopbank, in assessing the impact of the punitive damages award against Union on the ground that Union is the alleged alter ego or agent of Skopbank. The Court disagrees. The Court finds that the evidence conclusively establishes that Union is not, and was never, the alter

---

[1] The Court regards the jury's award of $8 million in punitive damages to each Plaintiff family as a single award of $40 million allocated evenly among them. Similarly, the remitted award of $500,000, which exceeds the statutory cap by a factor of two, will be allocated evenly among the Plaintiff families.

ego or agent of Skopbank. To the contrary, Skopbank is a legal entity separate and distinct from Union. Moreover, in light of Skopbank's precarious financial condition (which has resulted in its nationalization by the Republic of Finland in a series of acts from September, 1991 to the date of the *Hammond* hearing in this case), this Court's conclusion regarding the appropriate amount of punitive damages to be assessed against Union would not be altered by consideration of Skopbank's financial resources.[2]

Conclusion

Because Union has, as yet, to pay any punitive damages award for its pattern and practice of conduct, a punitive damages award is appropriate.[3] However, this Court finds that, considering all the factors in *Hammond* and *Green Oil*, a punitive damages award of $40 million is far in excess of that necessary to accomplish society's goal of punishment and deterrence of Union's pattern and practice of conduct throughout the United States. The following factors require that the award be

---

[2] Skopbank is not a party to this action. Testimony presented at the post-trial hearing from the Senior Vice President and International Coordinator of Skopbank established that Skopbank was in no way involved in, and had no knowledge of, the conduct complained of in this action.

[3] This Court is aware that a punitive damages award of $6 million was rendered against Union in the case of *Barlow v. Union Mortgage Company, Inc.* for the same pattern and practice of conduct at issue in this case. However, the Court is also aware that this case is on appeal before the Alabama Supreme Court. Although, the due process clause of the United States and Alabama Constitutions prohibits the imposition of more than one punitive damages award that fully punishes a defendant for the same pattern and practice, in view of the fact that there is some uncertainty as to whether the award in *Barlow* will be sustained, the Court will impose a punitive damages award in this case. If this Court were not to do so, and the Alabama Supreme Court failed to sustain the punitive damages award in *Barlow*, the result would be that Union's pattern and practice of conduct would go unpunished by a punitive damages award.

remitted to an amount in accord with these goals: Union has ceased purchasing home improvement contracts; Union itself did not participate in, know of, foresee, authorize or ratify the conduct of home repair companies which injured Plaintiffs and other consumers; and, the award is excessive in the light of Union's financial condition. In view of these facts, the punitive damage award in this case is remitted in the amount of $39.5 million.

A punitive damages award of $500,000 is the maximum amount that can be awarded to accomplish fully society's goals of the deterrence and punishment of Union's entire pattern and practice of conduct throughout the United States.[4] Any larger amount would violate the due process clause of the Alabama and United States Constitutions. Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

(1) The amount of compensatory damages awarded by the jury was excessive and Union's Motion for New trial will be granted unless within fourteen days (14) from the date of this Order, Plaintiffs accept a reduction of the compensatory award to the following amounts:

1. Joe & Patricia Lampley	—	$800,000
2. Johnny & Nina Tatum	—	$800,000
3. Robert & Mattie Person	—	$800,000
4. Lucille Baker	—	$800,000
5. Roral Hall	—	$800,000

(2) The amount of punitive damages awarded by the jury was excessive and Union's Motion for a New Trial will be granted unless within fourteen days (14) from the date of this Order, Plaintiffs accept a remittitur in the

[4] This Court is aware that only a single punitive damages award can be rendered against Union. However, for reasons of fairness, this Court has decided to allocate this award evenly among each Plaintiff family.

total amount of $39.5 million, which will reduce the punitive award to the amount of $500,000; to be allocated among each Plaintiff family as follows:

(1) Joe & Patricia Lampley	—	$100,000
(2) Johnny & Nina Tatum	—	$100,000
(3) Robert & Mattie Person	—	$100,000
(4) Lucille Baker	—	$100,000
(5) Roral Hall	—	$100,000

(3) The post-judgment motions of Union are DENIED in all other respects.

DONE this the 13th day of November, 1991.

/s/ William H. Robertson
WILLIAM H. ROBERTSON
Circuit Judge

cc: Mike Brock, Esquire
Jere Beasley, Esquire
Thomas Methvin, Esquire

APPENDIX P

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

vs.

CHARLES HARPER, *et al.*,
Defendants.

[Filed Nov. 14, 1991]

SATISFACTION OF JUDGMENT

Plaintiff, Roral Hall, hereby gives notice that the judgment heretofore entered in the above-styled cause has been satisfied in full.

/s/ Jere Beasley
JERE BEASLEY

Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon John Henig, Esquire, Post Office Box 347, Montgomery, Alabama 36101-0347, Mike Brock, Esquire, P.O. Box 270, Montgomery, Alabama 36195 and upon Albert G. Lewis, III, Esquire, Post Office Box 030148, Tuscaloosa, Alabama 35403-0148 by placing same in the United States Mail, postage prepaid and properly addressed on this the 14th day of November, 1991.

/s/ John M. Wilson
Of Counsel

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

vs.

CHARLES HARPER, *et al.*,
Defendants.

[Filed Nov. 14, 1991]

SATISFACTION OF JUDGMENT

Plaintiff, Lucille Baker, hereby gives notice that the judgment heretofore entered in the above-styled cause has been satisfied in full.

/s/ Jere Beasley
JERE BEASLEY

Of Counsel:

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/s/ John M. Wilson
Of Counsel

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

vs.

CHARLES HARPER, *et al.*,
Defendants.

[Filed Nov. 14, 1991]

SATISFACTION OF JUDGMENT

Plaintiffs, Robert and Mattie Persons, hereby gives notice that the judgment heretofore entered in the above-styled cause has been satisfied in full.

/s/ Jere Beasley
JERE BEASLEY

Of Counsel:

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/s/ John M. Wilson
Of Counsel

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

vs.

CHARLES HARPER, *et al.*,
Defendants.

[Filed Nov. 14, 1991]

SATISFACTION OF JUDGMENT

Plaintiffs, Johnny and Nina Tatum, hereby gives notice that the judgment heretofore entered in the above-styled cause has been satisfied in full.

/s/ Jere Beasley
JERE BEASLEY

Of Counsel:

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/s/ John M. Wilson
Of Counsel

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

Civil Action No. CV-90-048

LUCILLE BAKER, *et al.*,
Plaintiff,

VS.

CHARLES HARPER, *et al.*,
Defendants.

[Filed Nov. 14, 1991]

SATISFACTION OF JUDGMENT

Plaintiffs, Joe and Patricia Lampley, hereby gives notice that the judgment heretofore entered in the above-styled cause has been satisfied in full.

/s/ Jere Beasley
JERE BEASLEY

Of Counsel:

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/s/ John M. Wilson
Of Counsel

APPENDIX Q

IN THE SUPREME COURT OF ALABAMA

SC No.: 1901350

UNION MORTGAGE COMPANY, INC.,
Appellant,

vs,

WILLIE MAE BARLOW and WILLIE J. GALY,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF
LOWNDES COUNTY, ALABAMA

BRIEF IN SUPPORT OF APPLICATION OF UNION MORTGAGE COMPANY, INC. FOR REHEARING AND STAY OF EXECUTION OF JUDGMENT

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Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

(2)

No. 91-1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION MORTGAGE COMPANY, INC.,
Petitioner,

vs.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 91-1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION MORTGAGE COMPANY, INC.,
Petitioner,

VS.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" misrepresents the facts on which this case was decided. The true facts upon which this case was *unanimously* decided by the Alabama Supreme Court are set forth in that court's lengthy opinion. *Union Mortgage Co. v. Barlow*, 595 So. 2d 1335 (Ala. 1992). Respondents will not restate these facts which are succinctly recited in the Alabama Supreme Court's oplnlon .

On March 4, 1991, final judgment was entered by the Circuit Court of Lowndes County, Alabama, the trial court in this case. (Petitioner's Appendix E). This was the *first* final judgment ever entered against the Petitioner which assessed punitive damages.

On April 8, 1991, the trial court conducted a hearing to review the punitive damages award pursuant to *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); and *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). The transcript of that hearing is 555 pages of a 1,938 page reporter's transcript of the record on appeal. The hearing is accurately described by the Alabama Supreme Court in its opinion as "extensive." *Barlow, supra*, 595 So. 2d at 1345.

On April 26, 1991, the trial court entered an order in accordance with the procedure affirmed in *Haslip*. (Petitioner's Appendix F).

On May 22, 1991, Petitioner filed its notice of appeal to the Alabama Supreme Court. Petitioner posted a supersedeas bond staying execution on the judgment.

On October 8, 1991, the Alabama Supreme Court, en banc, heard oral arguments by Petitioner and Respondents. The opportunity for oral argument is rarely granted by the Alabama Supreme Court.

On November 13, 1991, one month after oral argument was heard by the Alabama Supreme Court, the Barbour County, Alabama Circuit Court entered an order in *Baker v. Harper* referred to by the Petitioner. (Petitioner's Appendix D). The order was filed by the Barbour County Circuit Court on November 14, 1991. (Petitioner's Appendix O, p. 86a). Petitioner made the decision to satisfy the *Baker* plaintiffs' judgments in the total amount of $4.5 million, which was an agreed upon settlement by the parties in that case. Petitioner agreed to pay the Barbour County plaintiffs *$4,000,000* in *compensatory damages* and *$500,000* in *punitive damages*. The very order entered by the Barbour County Circuit Court in *Baker v. Harper* was prepared by the trial attorneys for Petitioner in this case. (Petitioner's Appendix O, p. 87a). A satisfaction of judgment for each of the

five plaintiffs was filed on the same day the order was filed, November 14, 1991. (Petitioner's Appendix P).

On the same day the Barbour County Circuit Court filed the order in *Baker v. Harper*, November 14, 1991, Petitioner filed in the Alabama Supreme Court a motion to supplement the record on appeal in this Lowndes County Circuit Court case with matters from the subsequent proceedings from the Barbour County Circuit Court. (Petitioner's Appendix M). These matters were improperly admitted into the record on appeal in this case through clerical error, which error was subsequently corrected through the granting of Respondents' motion to strike. Alabama Rules of Appellate Procedure, Rule 10(f), provides the only procedure by which the record on appeal is supplemented. This rule only permits the inclusion of matters *which were in evidence at the trial level* and inadvertently omitted from the record on appeal. *See Richburg v. Cromwell*, 428 So. 2d 621 (Ala. 1983). Matters from another trial, from another circuit court, in which Respondents were not a party are obviously not within the scope of this rule.

On January 10, 1992, in accordance with *Haslip*, the Alabama Supreme Court unanimously affirmed the punitive damages award in this case, "[a]fter a thorough review of the record." *Barlow*, *supra*, 595 So. 2d at 1348.

On January 24, 1992, Petitioner filed in the Alabama Supreme Court an application for rehearing and, in the alternative, a motion to stay the issuance of the mandate pending certiorari proceedings. On March 6, 1992, the Alabama Supreme Court issued an order denying both the application for rehearing and the stay, with the certificate of judgment scheduled to issue March 24, 1992.

On March 11, 1992, Petitioner filed in this Court, an application to stay mandate of Supreme Court of Alabama pending certiorari, designated Application No. A-681. Petitioner main-

tained in its application that it was entitled as a matter of right to the stay pending filing of a petition for certiorari unless this Court determined that " 'the case bears no reasonable chance of review by this Court.' *American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theatre, Inc.*, 87 S. Ct. 1, 1-2 (1966) (Harlan, J., in chambers)." (Union Mortgage Inc.'s Application to Stay Mandate of Supreme Court of Alabama Pending Certiorari, Application No. A-681, Mar. 11, 1992, p. 6). Petitioner's grounds for contending in its application that a reasonable chance existed for this Court to grant its petition for a writ of certiorari are the same grounds asserted in the petition now before the Court filed June 4, 1992.

By letter dated March 20, 1992, the Clerk of this Court advised the Respondents of the following order:

> The application for a stay of mandate pending timely filing and disposition of petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on March 20, 1992 endorsed thereon the following:
>
> "Denied
> Anthony M. Kennedy
> March 20, 1992"

The letter is reprinted at Appendix A of this brief.

By letter dated March 20, 1992, Petitioner requested that its application be renewed, which letter reads in pertinent part:

> In accordance with Rule 22.5 of this Court, Union Mortgage Company, Inc., Petitioner in the above-captioned case, respectfully requests that its application To Stay Mandate Of Supreme Court of Alabama Pending Certiorari be renewed to Justice Sandra Day O'Connor. In the absence of a Stay from this Court, the state court will issue its mandate on March 24, 1992, at which time Respondents will be entitled to execute on the judgment.

The letter is reprinted at Appendix B of this brief.

By letter dated March 23, 1992, the Clerk of this Court advised of the following action taken on the application:

> The Court today entered the following order in the above-entitled case:
>
> > "The application for stay of mandate addressed to Justice O'Connor and by her referred to the Court is denied."

The letter is reprinted at Appendix C of this brief.

On March 24, 1992, the Alabama Supreme Court issued its mandate.

On March 25, 1992, Petitioner paid the judgment. Respondents delivered to Petitioner a satisfaction of judgment on March 25, 1992.

On June 4, 1992, the 90th day after entry of the order of the Alabama Supreme Court denying rehearing, Petitioner filed a petition for a writ of certiorari. The petition was received by Respondents on June 10, 1992.

SUMMARY OF THE ARGUMENT OF RESPONDENTS

No special and important reasons are presented by Petitioner for granting the petition in that *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), is dispositive authority.

ARGUMENT OF THE RESPONDENTS

Petitioner has not presented "special and important reasons" for granting the petition for a writ of certiorari in this case. Rules of the Supreme Court of the United States, Rule 10.1.

The sum and substance of the Petitioner's argument that the petition should be granted is stated in the following excerpt from the petition:

> "Union's constitutional challenge to the judgment is not based on an argument that Alabama's nominal procedures for awarding punitive damages violate Union's due process rights—those procedures were upheld in *Haslip*. Union's challenge is to Alabama's refusal to apply those procedures, and also to its post-judgment creation of a classification which impermissibly discriminated against Union on the basis of its parent's national origin. The result was the affirmance of the jury's punitive damages verdict in full, when Alabama procedures, applied in the manner contemplated by *Haslip*, should have resulted in elimination or substantial reduction of those damages."

(Petition, pp. 28-29).

Petitioner acknowledges that this Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), is controlling authority in this case. Petitioner further concedes that its due process rights were not violated in this case if Alabama's procedures for awarding punitive damages were applied in accordance with *Haslip*. Respondents submit that Petitioner was afforded the due process protections affirmed in *Haslip*.

On April 8, 1991, the trial court conducted a hearing to review the punitive damages award pursuant to *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); and *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). The transcript of the hearing is 555

pages of a 1,938 page reporter's transcript of the record on appeal. The hearing is accurately described by the Alabama Supreme Court in its opinion as "extensive." *Barlow, supra*, 595 So. 2d at 1345.

On April 26, 1991, the trial court entered an order affirming the punitive damages award of the jury in accordance with *Haslip*. (Petitioner's Appendix F).

On October 8, 1991, the Alabama Supreme Court, en banc, heard oral arguments by Petitioner and Respondents. The opportunity for oral argument is seldom granted by the Alabama Supreme Court.[1] A substantial portion of the oral argument in this case dealt with the reprehensibility of the Petitioner's conduct in light of the trial court's affirmance of the punitive damages award.

On January 10, 1992, the Alabama Supreme Court entered its unanimous opinion affirming the punitive damages judgment in this case. *Union Mortgage Co., Inc. v. Barlow*, 595 So. 2d 1335 (Ala. 1992). The Alabama Supreme Court specifically addressed the question: "*Was the jury's award of punitive damages excessive under the facts of this case*?" *Barlow, supra*, 595 So. 2d at 1345.

The Alabama Supreme Court determined that "[t]here was ample evidence presented to support the trial court's determination that Union Mortgage engaged in a pattern and practice of intentional wrongful conduct." *Barlow, supra*, 595 So. 2d at 1345. The Alabama Supreme Court reprinted verbatim the trial court's order entered "after an extensive hearing pursuant to

---

[1] On June 16, 1992, the Clerk of the Alabama Supreme Court informed counsel for the Respondents that during that court's term for the period October, 1990 through October, 1991, the Alabama Supreme Court received 893 appeals and 823 petitions for writ of certiorari. The Alabama Supreme Court during the 1990-1991 term granted oral argument in only 65 cases.

Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986) and its progeny." *Barlow, supra*, 595 So. 2d at 1345-1347. Based upon its own review of the record, the Alabama Supreme Court held as follows regarding the trial court's *Hammond* order:

> "In reviewing the punitive damages award in this case, the trial judge stated the reasons why the verdict should not be remitted. After a thorough review of the record, we hold that the facts aptly support the trial court's decision." *Barlow, supra*, 595 So. 2d at 1347-1348.

Petitioner's attempt to raise a constitutional question relating to a non-party, Skopbank, is without merit. Rules of the United States Supreme Court, Rule 12. Union Mortgage is a Texas corporation. The sole shareholder of Union Mortgage is a Texas holding company. Skopbank is the sole shareholder of that Texas holding company. Skopbank funneled money to the Texas holding company. The Texas holding company then, in turn, funneled money to Union Mortgage and other subsidiaries of the Texas holding company. Union Mortgage used the money funneled by the Texas holding company as capital to perpetrate its fraudulent course of business. The judgment affirmed in this case was only against Union Mortgage, a Texas corporation. The only assets available to satisfy the judgment through legal process were assets of Union Mortgage.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, the petition for a writ of certiorari is due to be denied.

Respectfully submitted,

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Attorneys for Respondents

APPENDICES

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543
(202) 479-3011

WILLIAM K. SUTER,
CLERK OF THE COURT

March 20, 1992

Mr. John A. Taber
Taber & Dansby
418 Scott Street
Montgomery, AL 36104

Re: Union Mortgage Company, Inc.,
v. Willie Mae Barlow and Willie J. Galy
Application No. A-681

Dear Mr. Taber:

The application for a stay of mandate pending timely filing and disposition of petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on March 20, 1992 endorsed thereon the following:

"Denied
Anthony M. Kennedy
March 20, 1992"

Very truly yours,

WILLIAM K. SUTER, Clerk

By: /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE — FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

NOTIFICATION LIST

Mr. Robert J. Sisk
Hughes, Hubbard & Reed
One Battery Park Plaza
New York, NY 10004

Mr. John A. Taber
Taber & Dansby
418 Scott Street
Montgomery, AL 36104

Mr. Edward L. Hardin
Hardin, Tucker & Martin
2151 Highland Avenue, Ste. 100
Birmingham, AL 35255-5705

APPENDIX B

HUGHES HUBBARD & REED
1300 I Street, NW
Washington, DC 20005-3306
(202) 408-3600

March 20, 1992

William K. Suter, Esq.
Clerk of the Court
U.S. Supreme Court Building
Washington, D.C. 20543

Re: Union Mortgage Co. v. Barlow, No. A-681

Dear Mr. Suter:

In accordance with Rule 22.5 of this Court, Union Mortgage Company, Inc., Petitioner in the above-captioned case, respectfully requests that its application To Stay Mandate Of Supreme Court of Alabama Pending Certiorari be renewed to Justice Sandra Day O'Connor. In the absence of a Stay from this Court, the state court will issue its mandate on March 24, 1992, at which time Respondents will be entitled to execute on the judgment.

Sincerely yours,

/s/ John M. Townsend

Attachments

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543
(202) 479-3011

WILLIAM K. SUTER,
CLERK OF THE COURT

March 23, 1992

Robert J. Sisk
Hughes, Hubbard & Reed
One Battery Park Plaza
New York, NY 20004

Re: Union Mortgage Company, Inc.,
v. Willie Mae Barlow and Willie J. Galy
Application No. A-681

Dear Mr. Sisk:

The Court today entered the following order in the above-entitled case:

"The application for stay of mandate addressed to Justice O'Connor and by her referred to the Court is denied."

Very truly yours,

WILLIAM K. SUTER, Clerk

By: /s/ Francis J. Lorson
Chief Deputy Clerk

gj

cc: John M. Townsend
John A. Taber
Edward L. Hardin, Jr.
Clerk, Supreme Court of Alabama
(Your No. 1901350)

MOTION FILED
JUL 6 1992

No. 91-1962

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE REPUBLIC OF FINLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1962

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Republic of Finland ("Finland") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case on behalf of Petitioner.*

1. Parties Consenting and Refusing Consent

The consent of the Petitioner has been obtained and has been lodged with the clerk of this Court. The consent of the Respondent was requested but refused.

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* As Respondents received the Petition for Certiorari on June 10, 1992 (Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 10), this motion is timely. Sup. Ct. R. 37.2.

2. Nature of Interest of the Republic of Finland

Finland submits this brief in order to protect its interest in the treatment of its nationals under the Treaty and Protocol of Friendship, Commerce and Consular Rights between the United States of America and Finland of February 13, 1934, 49 Stat. 2659, as modified by the Protocol of Regents of December 4, 1952, 4 U.S.T. 2047 (the "Friendship Treaty"). Finland also submits this brief in support of its interest in having due respect accorded by the United States to public acts of Finland within its territory, in keeping with principles of international comity.

In particular, Finland wishes to express its view that, by failing to accord a Finnish banking institution that has been taken over by the Bank of Finland the same protection from liability for punitive damages that would be accorded to American banking institutions taken over by governmental regulators, the decision below is inconsistent with the United States' obligations under the Friendship Treaty and with basic principles of international comity.

3. Issues Uniquely Addressed by *Amicus* Finland

Finland is in a superior position, relative to the parties, to inform the Court of the potential for the instant case to affect the rights of Finland and of its nationals under the Friendship Treaty. Finland is also in a superior position to argue the appropriate application of principles of comity.

Finland believes that the brief which it is requesting permission to file will contain a more complete argument on the international legal issues than the briefs filed by the parties to the case. These arguments, if accepted, would assist the Court in disposing of the case. Accordingly, Finland's motion should be granted and the attached brief should be considered by the Court in its deliberation on the Petition for Certiorari.

Respectfully submitted,

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Attorney for Amicus Curiae,
Republic of Finland

July 9, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1962

UNION MORTGAGE COMPANY, INC.,
Petitioner,

v.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

BRIEF FOR THE REPUBLIC OF FINLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Republic of Finland ("Finland") submits this brief in support of the petition of Union Mortgage Company, Inc. ("Union") for a writ of certiorari in this case.

INTEREST OF THE REPUBLIC OF FINLAND

Finland submits this brief in order to protect its interest in the treatment of its nationals under the Treaty and Protocol of Friendship, Commerce and Consular Rights between the United States of America and Finland of February 13, 1934, 49 Stat. 2659, as modified by the Protocol of Regents of December 4, 1952, 4 U.S.T. 2047 (the "Friendship Treaty"). (Pet. App. 41a.) Finland also submits this brief in support of its interest in having

due respect accorded by the United States to public acts of Finland within its territory, in keeping with principles of international comity.

Finland believes that, by failing to accord a Finnish banking institution that has been taken over by the Bank of Finland the same protection from liability for punitive damages that would be accorded to an American banking institution taken over by the Federal Deposit Insurance Corporation ("FDIC") or the Resolution Trust Corporation ("RTC"), the decision below is inconsistent with the obligations of the United States under the Friendship Treaty and with basic principles of international comity. The impact of the failure to accord protection here is that the burden of the punitive damages awarded by the Alabama courts will be borne by Finnish taxpayers.

In affirming the $6 million punitive damage jury verdict against Union, both the Alabama trial court and the Alabama Supreme Court looked directly past Union to the resources of its parent, Skopbank. (Pet. App. 22a-23a, 38a-39a.)[1] Skopbank is a Finnish banking corporation which serves as the central bank for all of the savings banks of Finland and which has its principal place of business in Helsinki, Finland. Skopbank was taken over

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[1] In considering the economic impact of the punitive award on the defendant, the Alabama Supreme Court quoted with approval the trial court's statement that it

> has considered the economic relationship between Skopbank and its wholly-owned subsidiary Union Mortgage. Skopbank has extended to Union Mortgage an unsecured line of credit totaling $550,000,000.00 dollars through a wholly-owned United States holding company. * * * Based upon the evidence presented at that [*Hammond*] hearing of April 9, 1991, this Court finds that a substantial portion of the $550,000,000 represents a contribution of capital by Skopbank of Helsinki, Finland, to its wholly-owned subsidiary Union Mortgage.

(Pet. App. 39a; *see also* Pet. App. 22a-23a.) In fact, the amount of the credit line and its characterization as a "contribution of capital" were unsupported by the evidence and are inaccurate. (Pet. App. 76a.)

by the Bank of Finland after the award was affirmed by the trial court, but before it was affirmed by the Alabama Supreme Court.

The seizure of Skopbank resulted from a drastic deterioration in its financial condition in 1991. (Pet. App. 46a, 72a-75a.) In order to restore confidence in Skopbank's activities and the Finnish interbank money market, the Bank of Finland, in cooperation with the Finnish Banking Supervision Office, took over majority beneficial ownership and voting control of Skopbank. (Pet. App. 46a, 72a-73a, 91a.) The effect was to place Skopbank in the equivalent of FDIC or RTC conservatorship.[2]

Although Alabama punitive damage review procedures give parties the right to bring new facts bearing on financial hardship to the attention of the appellate court, and Union did so, the Alabama Supreme Court ignored the Bank of Finland's takeover of Skopbank and Union's demonstration that the impact of the award would consequently fall on the Finnish taxpayer.[3]

---

[2] On June 15, 1992, the Bank of Finland transferred its ownership interest in Skopbank to the Government Guarantee Fund ("GGF"), a governmental institution, which was created by the Finnish Parliament in March 1992 and whose membership includes representatives from the Parliamentary Supervisory Board, the Ministry of Finance, the Bank of Finland, and the Banking Supervision Office. In general terms, the GGF is similar in nature and function to the FDIC and the RTC. The measures taken by the Bank of Finland from September 1991 were of the same kind that the GGF could have taken had it existed at the time.

[3] Respondents argue that these matters may not be considered on appeal. (Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 3.) This is mistaken, not only for the reasons set forth in the Petition for Certiorari, but also because where, as here, U.S. treaty obligations and principles of comity are implicated, comity itself warrants consideration for the first time on appeal of issues that would otherwise be deemed not to have been raised in timely fashion. *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991) (permitting issues relating to U.S.-Japanese Friendship

At the time of the verdict in this case, Union's net worth was less than the amount of the punitive damage award. (Pet. App. 58a-59a.) As a result of the punitive damages exposure ignited by this verdict, Union effectively ceased operating activities and had a negative net worth as of September 1991. (Pet. App. 68a-69a, 76a, 78a, 90a.) Because Union's exposure to punitive damages far exceeds its net worth and the Finnish Government is not able to identify anyone willing to purchase it, Union is one of the risks which the Finnish Government is likely to have to retain even if the Finnish Government is successful in finding a buyer for a reorganized Skopbank.

Skopbank is by far Union's largest creditor, with a credit line balance of approximately $126 million as of February 1992. (Pet. App. 46a.) Accordingly, Skopbank's resources will be further diminished as the punitive award significantly impairs Union's ability to satisfy this debt. The financial impact will ultimately be felt by the Finnish taxpayers, who already have contributed to fund a massive governmental capital infusion in order to save Skopbank from insolvency. (Pet. App. 46a-47a, 75a-76a.) This added burden on the Finnish taxpayer would not have occurred if the Alabama courts had respected the separate corporate identities of Union and Skopbank or if they had accorded Skopbank the same punitive damage immunity that they would have accorded an American bank taken over by the FDIC or the RTC.

Treaty to be raised for first time on appeal); *cf. Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (raising *sua sponte* comity issues between the state and federal governments); *Younger v. Harris*, 401 U.S. 37, 40 (1971) (same).

REASONS FOR GRANTING THE WRIT

The Friendship Treaty between the United States and Finland requires United States courts, state and federal, to afford the same civil and commercial rights and protections to Finnish nationals (including Finnish corporate entities) doing business in the United States as they afford to similarly situated U.S. nationals. By affirming the punitive damages award, not on the basis of the financial resources of Union, but on those of its Finnish parent, Skopbank, the Alabama courts gave Union less favorable treatment than they would have given a domestically-owned company, and thus acted in a manner inconsistent with the obligation of national treatment under the Friendship Treaty.

International comity, recognized as part of American law, was also disserved by the affirmance of a punitive damages award that will effectively be borne by an arm of the Finnish Government that has taken control of a Finnish company—in effect, by the Finnish taxpayer. Such punitive damages are unavailable against the United States government or the State of Alabama or against foreign governments sued directly in United States courts. International comity looks unfavorably on such a result.

I. THE DECISION BELOW IS INCONSISTENT WITH THE PRINCIPLE OF NATIONAL TREATMENT UNDER THE FRIENDSHIP TREATY.

A. The Friendship Treaty Has The Authority Of Federal Law In The Courts Of The United States.

International treaties to which the United States is a party enjoy supremacy under the United States Constitution. U.S. Const. art. VI; *United States v. Pink*, 315 U.S. 203, 231 (1942). Bilateral treaties of friendship, commerce and navigation, of which the Friendship Treaty is an example, have been uniformly interpreted as giving nationals of both parties legally enforceable rights which

must be given effect in U.S. courts.[4] As a class such treaties bind each State party on its territory to accord nationals of the other State party the same level of protection in broadly stated domains as it accords to its own nationals.[5]

This Court has many times emphasized that state law, whether legislative or judicial, should not be allowed to impair the federal foreign relations power or otherwise disturb U.S. relations with foreign states. *E.g., Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). This is particularly important where a treaty of the United States gives rise to legitimate expectations of protection on the part of a foreign state. *Kolovrat v. Oregon*, 366 U.S. 187, 191-96 (1961); *Zschernig*, 389 U.S. at 443, 451-57 (Harlan, J., concurring).

B. The Friendship Treaty Guarantees Finnish Nationals The Same Treatment In The Conduct Of Their Commercial Activities As Analogous United States Nationals Enjoy.

Article I of the Friendship Treaty provides that the nationals of each party "within the territory of the other shall be permitted * * * to carry on every form of commercial activity * * * upon the same terms as nationals of the state of residence in so far as may be permitted by local law." Among the burdens that Article I specifically guards against, under the principle of na-

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[4] *E.g., Kolovrat v. Oregon*, 366 U.S. 187, 196 (1961); *Spiess v. C. Itoh & Co. Am.*, 643 F.2d 353, 356 (5th Cir. 1981) (interpreting Friendship, Commerce and Navigation Treaty as self-executing); *MacNamara v. Korean Air Lines*, 1987 U.S. Dist. LEXIS 10218, at *3-4, (E.D. Pa. 1987), *rev'd on other grounds*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

[5] *E.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 186-88 (1982); *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258-59 (D.C. Cir. 1992); *MacNamara*, 1987 U.S. Dist. LEXIS 10218, at *6-7; *Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F. Supp. 1457, 1460 (S.D.N.Y. 1986).

tional treatment, is "the payment of any internal charges * * * other or higher than those that are exacted of and paid by its nationals," and among the general guarantees extended is "the most constant protection and security for * * * property." (Pet. App. 41a-42a.)

Article XVII of the Friendship Treaty underscores that the Treaty's protections extend not only to natural, but also to juridical persons. Nationals of both States are guaranteed rights and privileges "with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise." (Pet. App. 43a.) Such entities, if "organized or controlled or participated in by the nationals of either High Contracting Party within the territory of the other," are entitled to all the protections recognized in the territory where they do business. (*Id.*) This is confirmed by Article XVI, which gives "[l]imited liability and other corporations and associations, whether or not for pecuniary profit," the same rights provided they are "organized in accordance with and under the laws * * * of either High Contracting Party and maintain a central office within the territory thereof." (Pet. App. 42a.) Accordingly, under the Treaty, juridical persons, no less than natural persons, are to be regarded as nationals of the contracting parties and are entitled to equal treatment to the extent provided for in Article I.[6]

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[6] Even if Articles XVI and XVII were interpreted as according corporations only most favored nation treatment, the fact that other friendship treaties accord corporations national treatment means that most favored nation treatment *is* national treatment.

C. The Alabama Courts Failed To Accord Finnish Nationals The Equal Treatment To Which They Are Entitled Under The Friendship Treaty.

1. *The Alabama Courts Failed To Respect The Separate Corporate Identities Of A Finnish Corporation And Its U.S. Incorporated Subsidiary Where It Would Have Respected The Separate Existence Of A U.S. Corporation And Its Subsidiary.*

Article XVI of the Friendship Treaty provides that "corporations * * * which have been or may hereafter be organized in accordance with and under the laws * * * of either High Contracting Party * * * shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territory contrary to its laws." (Pet. App. 42a) (emphasis added). Thus, the Treaty itself obligates the courts of the United States to give the same respect to the separate juridical status of Finnish corporations such as Skopbank as to American corporations.[7]

It is well established under the law of Alabama that the corporate form separating an American parent and its subsidiary must be respected, absent a basis for piercing the corporate veil. *E.g.*, *Messick v. Moring*, 514 So. 2d 892, 894-95 (Ala. 1987); *Matrix-Churchill v. Springsteen*, 461 So. 2d 782 (Ala. 1984); *Kwick Set Components, Inc. v. Davidson Indus., Inc.*, 411 So. 2d 134 (Ala. 1982). Similarly, this Court has long recognized the principle that the doctrine of corporate identity must generally be respected. *E.g.*, *Bangor Punta Operations,*

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[7] Even apart from the Friendship Treaty, United States law requires that respect for separate corporate identity be shown to foreign state-owned corporations. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) [hereinafter "*Bancec*"] ("government instrumentalities established as juridicial entities distinct and independent from their sovereign normally should be treated as such").

Inc. v. Bangor & Aroostook R. Co., 417 U.S. 703, 713 (1974); *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). Had the punitive award been assessed against a subsidiary of a U.S. corporation, the financial resources of the parent could not have been considered without first establishing a basis for doing so by traditional alter ego analysis.[8]

The obligation to respect corporate identity was not honored here. As shown above, the Alabama trial court and the Alabama Supreme Court disregarded the separate juridical status of Union and Skopbank when they affirmed the $6 million punitive award based upon the financial resources of Skopbank.[9] In so doing, the courts did not even attempt to justify this unwarranted veil-piercing. By failing to give a Finnish Corporation and its U.S. subsidiary the benefit of this protection, the Alabama courts acted in a manner inconsistent with both Article XVI and the equal treatment obligation embodied in the Friendship Treaty, as well as with "principles of comity between nations" (further discussed below). *Bancec*, 462 U.S. at 626-27.[10]

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[8] *E.g., Gearhart v. Uniden Corp. of Am.*, 781 F.2d 147, 153 (8th Cir. 1986); *Herman v. Hess Oil V.I. Corp.*, 379 F. Supp. 1268, 1276-77 (D. St. Croix, 1974); *HCA Health Servs. v. National Bank of Commerce*, 745 S.W.2d 120, 123-24 (Ark. 1988); *Miller Brewing Co. v. Best Beers of Bloomington*, 579 N.E.2d 626, 641-42 (Ind. App. 1991).

[9] Indeed, Skopbank had not yet acquired Union at the time the events underlying this cause of action took place. (Pet. App. 46a.)

[10] The Alabama courts compounded the error of looking past Union to Skopbank by their failure, in so doing, to take account of Skopbank's actual financial distress. Such distress was manifest both at the time of the trial court's affirmance and even more so at the time of the Alabama Supreme Court's affirmance, at which point Skopbank's financial condition had deteriorated to such an extent that it was in the Finnish equivalent of FDIC or RTC conservatorship.

2. *The Alabama Courts Failed To Accord A Finnish Entity The Same Protection From Punitive Damages To Which A U.S. Entity Would Be Entitled Under Like Circumstances.*

It is well established under United States law that the assessment of punitive damages is improper when their burden will effectively be borne by innocent third parties whose "punishment" will serve neither the retributive nor deterrent purposes that punitive damages are supposed to serve. Thus, the Alabama Supreme Court held in *Resolution Trust Corp. v. Mooney*, 592 So. 2d 186 (1991), under highly analogous circumstances, that an award of punitive damages may not be entered against a domestic company taken over by the RTC, because the burden of such damages would necessarily fall on creditors who are not responsible for the wrongdoing and who are not appropriate targets of punishment or deterrence. *Id.* at 190; *accord Matter of GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir. 1982) (punitive damages may not be awarded against a company in a Chapter X reorganization proceeding since "the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing"); *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 178 (S.D. Fla. 1991) ("punitive * * * damages cannot be recovered against FSLIC as conservator").

The same general principle was given powerful expression by this Court in a somewhat different context in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). There, this Court held that the Civil Rights Act, 42 U.S.C. § 1983 (1988), could not properly be interpreted as authorizing the award of punitive damages against a municipality for civil rights violations committed by its employees. The Court found that imposing liability on a public entity based solely upon the wrongful conduct of its employees does not substantially further either the retributive or deterrent aims of punitive damages and thus could not be justified:

> Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

City of Newport, 453 U.S. at 267.

Because Union has a negative net worth, and Skopbank is Union's parent and largest creditor, the award here effectively imposes punitive damages liability initially on Skopbank. However, because Skopbank has been taken over by an arm of the Finnish Government, ultimately the Finnish taxpayers will bear the burden of the punitive award. Such a result advances neither the retributive nor the deterrent objective of punitive damages. Agencies of the United States would be spared punitive damages liability in like circumstances. National treatment accordingly calls for giving Finnish corporate and governmental entities the same consideration.

Moreover, United States Supreme Court precedent and Alabama law require that, in their review of a punitive damages verdict, the Alabama courts at least *consider* the impact of the award on innocent third parties. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991); *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (1986). Since a U.S.-owned entity would at a minimum be entitled to have the impact of the punitive award upon innocent third parties considered by a reviewing court under these circumstances, the refusal of the Alabama courts to accord even this minimum procedural safeguard to a Finnish-owned entity is also inconsistent with the obligation of national treatment.

D. Union May Raise The Issue Of Unequal Treatment Under The Friendship Treaty.

Among the rights accorded to Finnish nationals under the Friendship Treaty is the right under Article XVII to

"the organization of and participation in limited liability and other corporations and associations for pecuniary profit or otherwise." (Pet. App. 43a.) Once a Finnish national establishes such a local corporation under Article XVII of the Friendship Treaty, the obligation of national treatment contained in Article I requires that the local subsidiary be "considered for purposes of the Treaty to be [a] compan[y] of the country in which [it is] incorporated; [it is] entitled to the rights, and subject to the responsibilities of other domestic corporations." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 188 (1982).

In *Sumitomo*, this Court refused to allow the U.S.-Japanese Friendship Treaty to be used to give the American subsidiary of a Japanese company an immunity from federal employment laws to which American companies are not entitled. Such preferential and unequal status would have offended the cardinal principle of "national treatment" which lies at the heart of treaties of friendship. The same principle of equal treatment that made the subsidiary in *Sumitomo* subject to Title VII should operate here to secure for Union the same protections that a similarly situated American company would enjoy.[11]

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[11] This court accords "great weight" to treaty interpretations which have been agreed to by both parties. *Sumitomo*, 457 U.S. at 185; *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). In its submission to this Court in *Sumitomo*, the United States took the same position with respect to the rights of foreign-owned subsidiaries under the U.S.-Japanese Friendship Treaty that Finland takes with respect to the Friendship Treaty here:

> [The Treaty] ensures "national treatment" for Japan-controlled companies incorporated in the United States—i.e., it places them on an equal footing with American-controlled corporations in the United States * * * [T]he national treatment provided by the Treaty furnishes appropriate assurance against discriminatory measures directed at the foreign-owned company that could adversely affect the favorable investment climate the Treaty was intended to create.

Brief for United States as *amicus curiae* at 13-14, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

Later cases confirm that friendship treaties would be violated if a domestic subsidiary were "treated * * * differently under [U.S. law] solely because it is a wholly owned subsidiary of a foreign corporation." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258 (D.C. Cir. 1992); *accord MacNamara v. Korean Airlines*, 1987 U.S. Dist. LEXIS 10218, at *6-7 (E.D. Pa. 1987), *rev'd on other grounds*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

Union can also raise Skopbank's equal treatment rights under the doctrine of *jus tertii* standing. That doctrine permits a party to assert the rights of a third person if (1) "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," and (2) there is "some genuine obstacle" to the third person's assertion of his own right. *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976); *accord Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *Craig v. Boren*, 429 U.S. 190, 195-96 (1976).

Here, the relationship between Skopbank and Union is such that Union "is fully, or very nearly, as effective a proponent" of the right to equal treatment as Skopbank. *Singleton*, 428 U.S. at 115. Moreover, as Skopbank's rights were not violated until the Alabama courts affirmed the jury's verdict, and as Skopbank is not and never was a party in this case, Skopbank is not able to assert its own rights. Accordingly, Union has *jus tertii* standing to assert Skopbank's rights under the Friendship Treaty. *See Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) ("subsidiary [may] assert any of its parent's [friendship] treaty rights * * * to the extent necessary to prevent the treaty from being set at naught").

II. THE DECISION BELOW IS INCONSISTENT WITH PRINCIPLES OF INTERNATIONAL COMITY.

A. Principles Of International Comity Require United States Courts To Show Proper Consideration For The Legitimate Interests Of Foreign Governments.

International comity has long played a critical role in litigation in U.S. courts that implicates the legitimate interests of foreign states. This Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).[12]

Comity is not confined to cases in which a foreign sovereign is a party (as under the doctrine of sovereign immunity) or in which the validity of an act of a foreign sovereign on its own soil is directly called into question (as under the act of state doctrine).[13] On the contrary, this Court and lower federal courts have applied the doctrine of comity to a broad range of purely private litigation whenever respect for the fundamental interests of a foreign sovereign require them to do so.[14]

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[12] *Accord Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) ("Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

[13] *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (sovereign immunity); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state).

[14] *E.g., Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987) (refusal to assert personal jurisdiction over aliens); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (application of forum non conveniens in deference to foreign forum); *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) (respect for choice of non-U.S. forum); *Zschernig v. Miller*, 389 U.S. 429 (1968) (non-

This Court recently set out its analysis for applying comity in the context of deciding whether resort to the Hague Evidence Convention is required in obtaining evidence located abroad for use in U.S. judicial proceedings. In *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), both the five-member majority and the four-member minority agreed that comity dictated the answer. The majority favored a case by case application of comity in which courts consider the totality of the circumstances through a "particularized analysis of the respective interests of the [two nations.]" 482 U.S. at 543-44. The minority, in its partial concurrence, went even further, concluding that comity required an analysis of "the foreign interests, the interests of the United States, and the mutual interests * * * in a smoothly functioning international legal regime," and that this analysis dictated a general rule favoring exclusive use of the Hague Convention. 482 U.S. at 555 (Blackmun, J., concurring).

Both approaches taken in *Aérospatiale* are consistent with the framework of comity analysis provided for by the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987) and the various factors cited there.[15] *See*

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enforceability of reciprocity requirements imposed by state law against foreign governments); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84 (1958) (application of foreign law where foreign nation's interests are significantly implicated); *Hilton v. Guyot*, 159 U.S. 113 (1895) (recognition and enforcement of foreign judgments); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992) (refusal to enjoin foreign judicial proceedings); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987) (stay of U.S. proceedings in deference to foreign proceedings).

[15] Section 403(2) requires courts, in deciding whether to apply local law to a person or activity having connections with a foreign state, to consider among other things:

> (c) the character of the activity to be regulated, the importance of the regulation to the regulatory state * * * and the degree to which the desirability of such regulation is generally accepted;

also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment d (1971).

B. International Comity Counsels That U.S. Courts Not Impose Punitive Damages Under Circumstances In Which A Foreign State And Its Citizens Will Bear The Burden And In Which No Compelling Interest Of The United States Or Its Citizens Will Be Served.

Under any application of international comity, it is appropriate to balance the strength of a foreign government's interest in receiving a particular form of consideration against the competing interests of the private parties in obtaining, and the United States in according, treatment unaffected by the needs of comity. Such a balancing here weighs heavily in favor of showing deference to the acts of institutions of the Finnish Government in respect of the takeover of Skopbank:

1. The Finnish Government maintains a strong interest in the application of comity in this case. First, it has an interest in protecting its taxpayers and the financial soundness of its banking system from ruinous financial liabilities in the form of punitive damages.

Second, application of international comity is called for to protect Finland's substantial interest in the integrity of its reorganization law. As early as 1883, this Court ruled that a New York action to recover on the bonds of a Canadian railroad company undergoing

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(d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Section 403(3) further counsels that "a state should defer to the other state if that state's interest is clearly greater."

reorganization in Canada was barred by the pendency of the Canadian proceedings:

> Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the [reorganization] scheme may fail. All home creditors can be bound by the arrangement. What is needed is to bind those who are abroad. * * * *[T]he true spirit of international comity requires that schemes of this character * * * should be recognized in other countries.*

Canada S. Ry. v. Gebhard, 109 U.S. 527, 639 (1883) (emphasis added).[16]

2. At the same time, depriving a United States plaintiff of punitive damages cannot be regarded as a significant hardship, whether viewed as a general proposition or in the specific context of this case. Punitive damages are by definition not compensatory in nature. In other words, they are not required in order to make a tort victim "whole." They represent a windfall. As this Court acknowledged in *City of Newport*, "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious and to deter him and others from similar extreme conduct." 453 U.S. at 266-67.

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[16] A long line of cases establishes that under comity, U.S. courts owe deference to the overriding interest of foreign states in their conduct of conservatorship and like proceedings. *See, e.g., In re Goerg*, 844 F.2d 1562, 1568 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); *Cunard S.S. Co. v. Salem Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985); *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1260, 1262 (S.D.N.Y.), *aff'd without opinion*, 614 F.2d 1286 (2d Cir. 1979) (citing "the public interest in * * * international cooperation" and "principles of international comity"). The Bankruptcy Reform Act of 1978, 11 U.S.C. § 304(c) (1988), also cites "comity" as a factor in a court's decision whether to enjoin or stay an action against a debtor respecting property involved in a foreign proceeding.

3. Although Alabama may have a general retributive and preventive interest in punitive damage awards, that interest is necessarily diminished, if not wholly extinguished, when the party ultimately bearing the burden of the award is not at fault.

4. The mutual interest of all nations in reciprocity, commerce, and the smooth functioning of the international regime likewise militate heavily in favor of applying comity principles to this case.

First, the United States has clearly evinced in its own Federal Tort Claims Act a hostility to the recovery of punitive damages in tort claims against the government or its instrumentalities. 28 U.S.C. § 2674 (1988). This statutory waiver of sovereign immunity in tort expressly precludes the award of punitive damages in government tort cases.

Similarly, the State of Alabama has statutorily waived its immunity in tort, but expressly reserved for itself, its counties and its municipalities virtually complete immunity from the imposition of punitive damages. Ala. Code § 6-11-26 (Supp. 1991).

The attitudes of Congress and the States forbidding punitive damages against governmental entities are a strong indication of the consideration that courts in the United States properly owe a sovereign foreign government under like circumstances. The spirit of mutuality underlying the comity doctrine supports according a foreign government the same degree of protection against punitive damages that the United States and the State of Alabama claim for themselves.

Second, international law and practice counsel strongly against the imposition of punitive damages where their impact will fall upon a foreign state and its taxpayers. Indeed, with the possible exception of international crimes such as genocide, slavery and torture, principles of cus-

tomary international law prohibit the imposition of punitive damages against a foreign state.[17]

Under the U.S. Foreign Sovereign Immunities Act, foreign states and their political subdivisions are categorically shielded, insofar as they may be defendants in federal or state court, from exposure to punitive damages in tort. 28 U.S.C. § 1606 (1988). Similarly, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) has been uniformly interpreted as prohibiting the award of punitive damages.[18] International comity suggests that the same policy be extended to cases in which a foreign government, though not a named defendant, will as a practical matter bear the burden of a punitive award.

Finally, punitive damages are an institution that is, to put the matter simply, alien to most foreign legal systems, including the Finnish one. XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Ch. 8, § 124 (A. Tunc, ed., 1986). A fundamental notion in most civil law and civil law-influenced systems is that tort and criminal law form distinctive legal domains, and that the compensatory purposes of the former and the retributive and deterrent purposes of the latter should not be confused. Accordingly, the only recoverable damages in tort cases, indeed in all categories of cases, are compensatory in

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[17] *Velasquez Rodriquez Case*, Inter-American Court of Human Rights, Decision on Compensation (Ser. C) (July 21, 1989); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 901 Reporter's Note 5 (1987); E. Riedel, *Damages*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 71 (1987); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1215 (1967).

[18] *E.g.*, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991); *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Floyd v. Eastern Airlines*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

character. E. Aurejarvi, *General Principles of the Law of Obligations*, in THE FINNISH LEGAL SYSTEM, 134-36 (J. Uotila, ed., 2d ed., 1985). The singular character of punitive damages from the foreign perspective supports application of comity principles, particularly when a foreign government is their effective target.

Thus, all considerations relevant to the traditional application of international comity in U.S. courts—most notably the strength of Finland's interest in the integrity of its banking system and reorganization law and in the protection of its taxpayers, the insignificance of the U.S. interests, and the absence of hardship to the Respondents —support review by this Court of the affirmance of the punitive damages award in this case.

CONCLUSION

For the reasons stated above, the Republic of Finland supports the petition for a writ of certiorari.

Respectfully submitted,

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No. 91-1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNION MORTGAGE COMPANY, INC.,
Petitioner,

vs.

WILLIE MAE BARLOW and WILLIE J. GALY,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama

RESPONDENTS' OBJECTION TO THE REPUBLIC OF FINLAND'S MOTION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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RESPONDENTS' OBJECTION TO THE REPUBLIC OF FINLAND'S MOTION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Respondents hereby object to the Republic of Finland's motion for leave to file a brief *amicus curiae* in this case on behalf of the Petitioner on the grounds set forth herein.

1. The proposed *amicus curiae* brief of the Republic of Finland does not bring new matters to this Court's attention.

The proposed *amicus curiae* brief of the Republic of Finland does not meet the requirements of Rule 37.1 of this Court

providing that such a brief must bring relevant matters to the Court's attention not already brought to its attention by the parties. The proposed *amicus curiae* brief of the Republic of Finland advances the same argument made by the Petitioner.

2. The proposed *amicus curiae* brief of the Republic of Finland is inaccurate in its representation of the evidence regarding the capitalization of the Petitioner.

At footnote 1 on page 2 of the proposed *amicus curiae* brief of the Republic of Finland the text omits an extremely important portion of the trial court's *Hammond* order in which the trial court noted that "Union Mortgage did not produce any documents which reflect any obligation to repay the money advanced under the 'line of credit.' " (Pet. App. 39a). The Petitioner offered no explanation during the *Hammond* hearing regarding the absence of documents supporting the alleged "loan"; however, the evidence during that hearing did establish that the Petitioner derived millions of dollars of interest income from its mortgage portfolio but that the Petitioner paid no taxes of any consequence in this country due to that income. The trial court properly determined, after hearing testimony on the subject by an investment banker, a certified public accountant, and a professor of finance, that the distinct corporate entity, Union Mortgage, possessed sufficient assets to satisfy the punitive damages award in this case. After a thorough review of the record, the Alabama Supreme Court affirmed that assessment.

The Republic of Finland's entire argument is premised on the assumption that Skopbank was a legitimate creditor with claim to all the assets of Union Mortgage for satisfaction of an asserted debt. This argument has already been addressed and rejected by the Alabama Supreme Court.

Based upon the matters set forth herein, the Republic of Finland's motion for leave to file an *amicus curiae* brief in support of the Petitioner is due to be denied.

Dated: July 23, 1992

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing upon the below listed persons by U.S. Mail properly addressed and first-class postage prepaid, on this 23rd day of July, 1992.

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